1st Ed of Abridgement

DOCTOR and Student. The Fyrste Dyalogue in Englysshe bytwyxt a Doctoure of Dyuynyte and a Student in the Lawes of Englande, imprinted by Robt. Wyer. The Secunde Dyalogue in Englysshe, *imprinted at London in Southwarke by Peter Treuerys*, 1530, in 1 vol., small 8vo., **Black Letter,** *calf, neat, rare*, 14*s*.

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AN
Exact Abridgement
OF
THAT EXCELLENT
TREATISE
called
Doctor and *Student*.

Cicer. Orat.

Legum idcirco ſerui ſumus vt liberi eſſe poſſimus.

LONDON,
Printed by the Aſſignes of *Iohn More* Eſquire, and are ſold by *Mathew Walbancke*, at *Grayes* Inne Gate.
1630.

Cum priuilegio.

Law
Offices
of
Gt. Britt.
"
"
St. Mar.

Li: 6d: Thomas Shippard bought of Col Rich: Nelme seven Load 26s 8d: 1658. pratis. Vj!

To the Reader.

IS it therefore more *subiect to apposition, because what was before priuate, is now exposed to publike vse? Or rather, shall not his ingenious disposition be, if not applauded, yet at least acquited, that for common benefit offers himselfe, his expence of care and charge to a generall acceptation?*

What is but euen now offered to view, or that whereof there is only a present Notion may truly be called New: And therefore this Treatise, though formerly thus composed, and so imprinted for the Authors sole vse and delight, as to

the World is neuertheleſſe now an Infant, tender, apt for all impreſſions of Frownes or Affection. Let it not periſh in your hand, whoſe helpe it implores, whoſe Aduantage is cauſe of its Birth, is Life of its Being.

Although it affects an acute conciſe expreſſion, of what was formerly in a more copious ſtile deliuered, yet ſo iuſt is it to it ſelfe, the Author and All, that whats materiall, remaines nothing obſcured or impeached.

The Definitions, Diuiſions, Explanations, Examples of Law *tempered, improued by* Equitie *and Conſcience make a complete Diſcourſe, the Practice cauſeth, continueth a perfect Weale-publike, a ſecure Gouernment: And by how much former times were in this more chaſte and curious; So much more valuable is this Worke, more happie the vſe and application.*

To

To the Reader.

To oppose or dispute Maximes and Principles is not the wisest labour; So to commend what is knowne Excellent, is to gild Gold, a fruitlesse and friuolous Endeuer. The name of the Booke proclaimes its owne Esteeme, whereto, neuertheleſſe, the venerable Approbation of Men, famous for their knowledge and experience in the Lawes of England, is no small addition of Worth and Reputation. An expreſſion of whats well intended, issues with the greater confidence; and whats well accepted needs no Apologie: The Senſe of the one, the Hopes of the other produce this, That an Epiſtle to this Booke, is of Courteſie, not of Neceſſitie.

I. L.

The Table.

Chattels,

Arrest

[illegible] any ma[n] may arrest [illegible] out attainted or outlawed [illegible] of strong. but by force [illegible] of a Capias none may [illegible] but by authority from [illegible] the Sheriffe lib. 2. ca[p.] 41.

Dower,

Iurie

Alienation

If done by Deed poll or by fine vide Northfide. lib. 2. ca. 1.

FINIS.

S^t. *Germens* Booke

OF

THE GROVNDS

of the Lawes of *England*,
and of Conſcience:

OR,

An exact Abridgement of that exquiſite Treatiſe called *Doctor and Student*.

DIuines treat, in manner following, of foure Lawes, The Law Eternall, The Law of Nature of reaſonable Creatures, or the Law of Reaſon, The Law of God, and the Law of Man: vpon three of which Lawes, viz. The Law Eternall, The Law of Nature, and The Law of God, all good Lawes, and conſequently the Lawes of England muſt needs be grounded.

CAP. I.

THe reason of the wisdome of God, mouing all things by wisdome made to a good end, is called the Law Eternall. This was the first Law, and all other Lawes are deriued of it: Insomuch that euerie man that hath right and title to that hee hath righteously, hath it of the rightwise Iudgement of the first Reason, which is the Law Eternall. And it is this Law that is written of *Prou.* 8. Per me Reges regnant, & legum conditores iusta discernunt; and although, Quæ Dei sunt nemo scit nisi Spiritus Dei, yet so much hereof as is necessarie for vs to know, is shewed vs by God three wayes, viz. by naturall reason, and then it is called the Law of Nature: by heauenly reuelation, and then it is called the Law of God: and by the order of a Prince, and then it is called the Law of Man: which three Lawes hauing seuerall names, as they be shewed vnto Man, are called in God one Law Eternall.

CAP.

Cap. II.

The Law of Nature, &c. is a Law written in the heart of euerie man, Christian and Infidell, teaching them by the naturall light of vnderstanding, what is to be done, what to be fled in the course of this life, which Law being written in the heart, is neuer changeable by diuersitie of place or time, although it be obscured by sinne and euill custome, wherefore the Law of man was necessarie to adde hereunto. Against this Law any Prescription, Statute, or Custome is void: And all other Lawes, aswell the Law of God, (as to the acts of Men) as others be grounded hereupon. This Law expounds the generall rules of the Law of Man, and restraines them if they be not consonant vnto it: It teacheth that good is to be loued, euill to be fled; That thou shalt doe as thou wouldest another should doe to thee; That we doe nothing against truth; That a man liue peaceably with others; That Justice is to be done to euerie man, wrong to none. And it suffereth many things, As to repell

force with force, To defend himselfe and his goods against an vnlawfull power. In that the Law whereby all things were in common is changed, it is manifest that it was neuer the Law of Nature, but vsed only for the necessitie of the time, for the Law of Nature, as abouesaid, is vnchangeable.

Cap. III.

The Law of God, is giuen by reuelation to creatures reasonable, shewing vs the will of God, willing vs to doe a thing, or not to doe it, for obtaining felicitie eternall, such be the Lawes of the old and new Testament called Mozals: But Lawes shewed by reuelation of God, for the politicall rule of the people called Judicials, are excluded by the words of obtaining felicitie eternall. And Lawes made by man are sometimes called the Law of God; As when they take their principall ground vpon the Law of God, and are made for conseruation or declaration of the faith, as diuers Lawes Canons, and also diuers Lawes made by the common people sometimes doe.

But

But all Canon Lawes are not the Law of God, for some of them are made for the politicall gouernment of the people. There are foure reasons why this Law was necessarie, besides the Law of Reason, and the Law of Man: 1. Because man is ordained to felicitie eternall, and this directeth him to that end. 2. Because Mans Law is many times vncertaine, by reason of the vncertaintie of mens iudgements, &c. 3. Because it belongeth to perfection, that man be well ordered inwardly also, where man only makes lawes of outward things. 4. It would hurt the Common-wealth, that the Law of man should punish all offences, as is of contracts which be suffered for the Common-wealth, though many offences rise thereby, then to the intent no euill should be vnpunished, this Law was necessarie.

Cap. IV.

The Law of Man, or Law positiue, is deriued as necessarily and probably following of the Law of Reason, and of the Law of God, and in euerie Law of man well made, is

somewhat of the Law of Reason, and of the Law of God. That such Law be righteous, two things be necessarie; wisdome, to iudge of the conuenientie, and Authoritie; for Lex is deriued of Ligare, which the sentence of a wise man without authoritie doth not. These properties be required in it, if it be a good Law, viz That it be honest, righwise, possible, conuenient for the place and time, necessarie, profitable, manifest, not mixed with priuate wealth, but made altogether for the Common-wealth. The Lawes of Man, not contrarie to the Law of God, nor of Reason, must be obserued in the Law of the soule, and he that despiseth them resisteth God. And where, for that euill men forbeare to offend for feare of paine, the Law of God commandeth, that the people shall take away euill from amongst themselues, whereupon paines are with conuentencie ordained: These haue a conformitie to the Law of God, yet not so, but that other paines might be ordained, standing the first principles: This therefore is most properly called the Law of man.

Cap.

Cap. V.

The Law of England is more ſpecially grounded by the Student of the ſame Lawes, vpon ſix principall grounds, viz. The Law of Reaſon, The Law of God, Generall Cuſtomes, Maximes, Particular Cuſtomes, and Statutes.

¶ When any thing is grounded vpon the Law of Nature, the reaſoning in the Lawes of England is not what the Law of Nature will, but they ſay, that Reaſon will that ſuch a thing be, or that ſuch a thing is againſt reaſon. This Law of Reaſon is diuided into the Law of Reaſon primarie and ſecundarie: By the Law of Reaſon primarie are prohibited Murder, Periurie, Deceipt, Breaking the peace, &c. and by the ſame it is lawfull to defend himſelfe againſt an vnlawfull power, ſo he keepe due circumſtances. The Law of Reaſon ſecundarie is againe diuided into ſecundarie generall, and ſecundarie particular: Generall is grounded on the generall Law of propertie, by which branch Diſſeiſins, Treſpaſſe

in lands and goods, Reſcous, Theft, vnlawfull detaining another mans goods, &c. are prohibited by the Lawes of England: and by the ſame Law ſatisfaction is giuen for treſpaſſe, and reſtitution muſt be made of goods detained, debts paid, couenants fulfilled, &c. and becauſe Diſſeiſins, &c. had not beene knowen, if the Law of propertie had not beene, therefore all things deriued by reaſon out of the ſaid Law of propertie, be cal'ed the Law of reaſon ſecundarie generall, for the Law of propertie is generally held in all ciuill Countries. Secundarie particular, is the Law deriued vpon Cuſtomes generall or particular, Maximes and Statutes of this particular Realme, and is ſo called, becauſe the reaſon is deriued of a Law that is only holden for Law here: For example by a Law of Cuſtome in England, If a man take a Diſtreſſe lawfully, he may put it in Pound ouert, there to remaine till he be ſatisfied of that he diſtrained for, then if theſe beaſts die there for want of meat, if it bee demanded at whoſe perill it is, the Law of reaſon will at the perill of the owner, for that there was no default in him that diſtrained. All birds, fowles, wilde

beaſts

poſſeſſ. lib. 2. ca. 27. & Fuſt. 47. b. f.

beasts of the forrest and Warren, &c. ferae naturae are excepted by the Lawes of England, out of the generall Law of propertie: But Herons & Hawkes egges belong to the owner of the ground.

v. 5. Co. 104. b. & 7. Co. 16. Brand.

Cap. VI.

FOr declaration that the Law of God is a ground of the Law of England: It is inquired in many Courts of this Realme, whether any hold opinions against the Faith, &c. Also any generall Custome or Statute made against the Law of God, As that no almes should be giuen, were voyd, and yet the Statute of 23. E. 3. against alms to be giuen to valiant beggars is good, for it obserues the intent of the Law of God. Also he that is accursed shall maintaine no action in the Kings Courts (except in few cases) so that the excommunication be certified vnder the seale of the Ordinarie. The Law of England also by authoritie of this ground admitteth the spirituall iurisdiction of dismes and offerings. And in many cases the Kings Judges must iudge after the Law

v. Litt. Sect. 201.

Law Ecclesiasticall, As if a writ of Right of ward be brought of the bodie &c. and the Tenant confessing the tenure and nonage of the infant saith, that he was married in the life of his Ancestor, &c. whereupon they are at issue, and the Jurie giue their verdict at large, that the Infant was married in the time of his Ancestor, but that his wife liuing the Ancestor sued a diuorce, whereupon a sentence of diuorce was giuen, and that thereupon there sued an Appeale, which yet dependeth indiscussed, and pray the aduice of the Court, whether the Infant shall be said married or not, hanging the Appeale; In this case a Iudgement conditionall shall be giuen, &c. So in other cases. And the Ecclesiasticall Iudges also must in many cases giue their sentence according to the Lawes of the Realme; As if two Ioyntenants be of goods, and one of them deuiseth his part to A. and maketh his companion his Executor and dies, and now A. sueth for his legacie in the Spirituall Court, they ought to adiudge the deuise void, because by the Common Law the part accrues to the Suruiuor: So if one outlawed deuiseth his goods and dieth, and

Litt. v. ca. 25. in sect. fol. 287. b.

v. ca. 25. in fol. 2.

and the King seiseth the goods, and giueth them againe to the Executor, and now the Legatorie sues a Citation in the Spirituall Court against the Executor, to haue execution of this Legacie, they must according to the Common Law adiudge the deuise void, and yet in their Law there is no such forfeiture of goods by Outlawrie.

CAP. VII.

THe Generall Customes of the Realme, bee properly called the Common Law, and it is alwayes determined by the Iudges, and not by Iurie, whether there be any such Generall Custome or not. These and the Maxims, whereon most part of the Law of this Realme dependeth take their effect by the old Custome of the Realme, and the King at his Coronation taketh a solemne Oath, That he shall cause all the Customes of his Realme to be obserued. For example of Generall Customes: ¶ Generall Custome is the ground of the Courts of Chancerie, Kings Bench, Common Pleas, and Exchequer, which be Courts of Record, and none may sit as

as Iudges in any of these Courts but by the Kings Letters Patents, So is it of base courts, as Countie court, Sheriffes Torne, Court baron, and Court of Pypowders which is incident to euerie Faire and Market, which Custome is of such auctoritie, that the names nor iurisdiction of the said Courts cannot be altered but by Act of Parliament. ¶ By this Generall Custome, no man shall bee imprisoned, disseised, or otherwise destroyed, but he be put to answer by the Lawes of the Land, which is confirmed by Magna Charta cap. 26. ¶ Likewise all men, small and great, shall doe and receiue Iustice in the Kings Courts, which is confirmed by the Statute Marlb. cap. 1. ¶ Also the eldest sonne only shall inherit: If there be no sonnes, all the daughters, so of sisters and other kinswomen, for default of sonne, daughter, brother, and sister, the next of kin of the whole bloud, how many degrees soeuer he be off, and if there bee no heire, the Land shall escheat to the Lord of whom, &c. ¶ Land shall neuer descend from the sonne to the father, or other Ancestor in the right line, but rather escheat. ¶ If an Alien haue a

sonne

ſonne that is an Alien, and now is made Denizen, and hath another ſon, and purchaſeth land and dies, the youngeſt ſhall inherit: So note this differeth from the caſe where the elder brother is attainted in the life of his father, but if the Alien had purchaſed land before his indenization, the ſonne borne after ſhould not haue inherited that, but the King ſhould haue had it. Inſtit. 8. a. ca. 9. 59. and.

Alſo note, the King may make a Denizen by his Letters Patents, but not an Heire, but by Act of Parliament, becauſe this ſhould be prætudiciall to him that is Heire, or the Lord by Eſcheat. ¶ The eldeſt ſhall inherit the middle brother. ¶ Land deſcends on the part of the father, if the ſonne die without iſſue the diſcent ſhall be to the heires on the part of the father, And if the father purchaſed the land, then in default of ſuch heires, to the heires on the part of the fathers mother, but by no meanes to the heires on the part of the ſons mother, but ſhall rather eſcheat, but if the ſon had purchaſed the land, otherwiſe it is. ¶ If the ſonne purchaſe & die without iſſue, the diſcent ſhall be to the Vncle, and not to the father, but if the father at any time after haue another

Inſtit. 8. a.

childe

Fitzh. fo. 11. b.

childe by the same wife, he shall enter vpon the vncle as heire to the brother. (B. So where a daughter entreth as heire, and now a son is borne, but this is to be vnderstood only of Discents, and not of Purchases, for if

So.
Fitzh. Ent. 1. fo. 95. a. v. Co. li. 1. fo. 99. a. & 95. a.

the daughter enter as next heire where the mother assents to a Rauishor, or for a Condition broken, or into a Perquisite of a villeine which she hath by Discent, though a sonne be borne after, the daughter shall retaine the land: So of a remainder. ¶ By the Custome of the Realme the childe borne before mariage is bastard, and shall not inherit. ¶ Goods and Chattels shal go to the Executors Ordinarie, or Administrator, and not to the Heire.

v. Co. a remainder Co. lib. 1. f. 95. a.

¶ The husband shall haue all Chattels personals that his wife had at the time of th'espousals, or after, and Chattels reals if he survive his wife, or alien them in his life time, or else they shall remaine to the wife if shee survive, but personals goe to the Executors of the husband. ¶ The husband shall be Tenant by the Courtesie of a possession in fait, of the whole land of the wife, &c. ¶ The wife shall bee Tenant in dower of a possession in fait or law, of the third part of the

5. Co. 36. a. Perkins. fo. 107. b. & 5. Co. 36. a. Fitzh. 406. Pl. Com. 192. b. & Fitzh. fo. 185. & com. 191. a. & Fitzh. 185. b. &

v. Perkins. fo. 90. a.

land

land of her husband, &c. so she be of the age of nine yeares or aboue at the death of her husband, though the husband be vnder nine, Vet. N. B. fol. 7. that if the husband be not xij. yeares of age, the wife shall not be indowed though she be nine. ¶ After the death of Tenant by knights seruice, the Lord shall haue the ward and marriage of his heire within age till xxi. but if the heire be of full age, he shall only pay relefe, which was vncertaine till the Statute of Magna Chart. cap. 2. But thereby for euery whole Knights fee it is C. s. whole Baronie C. markes, whole Earledome C. li. and so after the rate: If the heire be a woman and within xiij. at the death of the Ancestor, by the Common Law she should haue bene in ward till xiij. but by West. 1. cap. 22. she shall now be in ward in such case till xxi. but if she be xiij. or aboue at the death of the Ancestor, she shall be out of ward, & then shall pay relefe only. ¶ The heire in Socage within xiij. at the death of his Ancestor, his next friend to whom the land may not descend, shall haue the wardship of his bodie and lands, till xiij. and then he may enter, and at his age of xxi. yeares the Gardian

Litt. Sect. 36. Inst. 33

Et nomen bene. Inst. 33. a

Lit. Sect. 103.

Lit Sect. 112. 7. Co. 33. b. 34. a. 9. Co. 123. b. 124. b.

Lit. Sect. 103.

Lit. Sect. 123.

Litt. Sect. 124 Gardian shall accompt to him for the profits thereof receiued. ¶ The heire in Socage shall for his relæfe double
Litt. Sect. 126. his rent the yeare following the death of his Ancestor, which relæfe he must pay, though he be within age at the death of his Ancestor. ¶ A Frée-hold passeth not by feoffment, gift, or leafe without liuerie: But by surrender, partition, or exchange it passeth without liuerie. ¶ A Deuise of land by will is void, *(See now the Statute of 32. H. 8.)* but good of a vse, Also it is good in London of land by the Custome, if it be inrolled. ¶ A leafe for yeares is but a Chattell, and therefore passeth without liuerie: Otherwise it is of a leafe for life, for that is a Frée-hold. ¶ A man may distraine for a rent seruice of common right, so for a rent reserued on a gift in taile, leafe for life, yeares, or at will, and the beasts of his Tenant as soone as they come on the land, but not of a stranger till they haue bæn leuant and couchant there. For debt, accompt, trespasse, reparations, &c. a man may not distraine. ¶ All issues ioyned betwæn partie and partie in Courts of Record (except few) shall be tried by xij. lawfull men of the Visne, &c. of

v. Stat. 3. Co. Butler & Baboue's case. 1
v. 5. Ca. 10.
v. 7. Co. 84. b.

ne

affinitie to either partie; In Courts not of Record, as Countie court, Court baron, Hundred, &c. by oath of the parties, and not otherwise, vnlesse by assent it be tried by the homage. Note that Lords, Barons, & Pæres of the Realme, are exempted out of such trials: but if they will voluntarily be sworne it is no error; Also if they will they may haue a Writ out of the Chancerie to the Sheriffe, to prohibit him to impanell them. And these said Customes cannot be proued by reason, although they be reasonable, which with the old Customs of the Realme is sufficient authoritie for them in our Law. But yet a Statute made against such a generall Custome is good, because these Customes bee not meerely the Law of Reason. ¶ The Law of Property may also be put vnder this ground, for it is a Law of Custome and not of Reason. 9. Co. 49. a. 6. Co. 53 a.

Cap. VIII.

The Maximes haue alwaies beene taken for Law in this Realme, which is such authoritie vnto them, that there need no reason be assigned

for them, for they may not be denyed: which is a Maxime, which not, shall alwayes be determined by the Judges and not by xij. men; All cases like them, and necessarily following of them, are to bee reduced to Law, which that they may the more conuentently be applyed to them, most commonly some reasons are assigned for the Maximes. The Generall Custome of the Realme is the warrant for these Maximes, as it is for the Generall Customes: and the difference betweene Generall Customes and the Maximes is, only the Customes are generally knowen; the Maximes but only to the learned in the Law, which is the cause they are placed as seuerall grounds, he that list may take them as one. Example of Maximes. ¶ Escuage vncertaine makes Knights seruice. ¶ Escuage certaine, Socage. ¶ Tenure by Castle gard is Knights seruice, but he holdeth not by Escuage: Tenure by xx. s. to the Gard of a Castle is Socage. ¶ A Discent tolleth an Entrie. ¶ Prescription makes no right in land. ¶ Of Rent and profit Apprender out of land it maketh a Right. ¶ Limitation of prescription generally

rally taken is from the time that no mans minde runs to the contrarie. ¶ Assignes may be made of lands giuen in fee, for life, or yeares, though Assignes be not mentioned: so of a Rent: contrarie of a Warrantie, and of a Couenant. ¶ A Condition to auoyd a Freehold cannot bee pleaded without Deed, but to auoyd a Chattell it may. ¶ A Release or Confirmation by him that at that time hath no right is void, though a right come to him after, except it be with warrantie, for then it barreth of all the right that he shall haue after the warrantie made. ¶ A Right or title of action that only dependeth in action cannot bee granted but to the Ter-Tenant, or to him that hath the reuersion or remainder of the Land. ¶ In an action of Debt vpon a contract, the Defendant may wage his Law, otherwise it is vpon a lease for yeares, or at will. ¶ If an Exigent in case of Felony bee awarded, the partie hath thereby forthwith forfeited his goods to the King. ¶ If the sonne be attainted in the life of the father and purchase his pardon, and now the father dieth, the land shall escheat to the Lord of the Fee, though

Lib. 365

v. Lib. sect. 446.

Perkins fo. 19. a.

v. Inst. 295. a. t.

v. 5. co. 110. b

Perkins fo. 6. a.

n. Co. 41. a.

Fo. lib. 13. a. c.

there be a younger brother, for the bloud is corrupt, and the father dieth without heire in law. ¶ If an Abbot or Prior alien the lands of his house and die, though his Successor haue right he may not enter but is put to his action. ¶ If a Villeine purchase lands, and his Lord enter, he shal haue the land as his owne, but if the Villeine alien before the entrie of the Lord, the alienation is good. Like Law of goods. ¶ If a man steale goods to the value of xij. d. or aboue, it is Felony, and he shall die for it; if vnder xij. d. it is Petite Larceny, and hee shall not die, but be otherwise punished at the discretion of the Justices: but how little soeuer is taken from a mans person felontously is Robberie, and the partie shall die for it. ¶ He that is arraigned vpon an indictment of Felony, shall be admitted in fauor of life to challenge 36. Jurors peremptorily, (vide ore Stat. 25. H. 8. cap. 13.) but if he challenge aboue, the Law taketh him as one that refuseth the Law, because he hath refused three whole Inquests, and therefore he shall die, but with cause he may challenge as many as he please: Such peremptorie challenge shall not be admitted in an Appeale,

Fitzh. 156. 10. Co. 104. b. 1.

Pl. Com. 476. 11. Co. 30. b. 100. b. 1.

Stauf. Pl. Cor. 157. B.

peale, becauſe it is at the ſuit of the party. ¶ The land of euery man is in Law incloſed from others, though it lie in the open field, and the Writ of Treſpaſſe ſhall be Quare clauſum fregit. ¶ Rents, Commons of paſture, Turbarie, Reuerſions, Remainders, &c. which lie not in manuall occupation, may not bee granted without Deed. ¶ He that recouereth debt or dammages by an action, wherein a *Capias* lay in the Proceſſe, may within the yeare haue a *Capias ad ſatisfaciendum*, otherwiſe hee muſt take a *Fieri facias*, or *Elegit* within the yeare, or a *Scire facias* after the yeare, or within if he will. ¶ A Releaſe or Confirmation to him, that at that time hath nothing in the land, &c. is void, except to Vouchee, &c. ¶ The King may diſſeiſe no man, ne be diſſeiſed, nor haue a reuerſion or remainder pulld out of him. ¶ No Freehold may be giuen to the King, nor deriued from him, but by matter of Record. ¶ Sometime no man ſhould haue a Writ of Right, but by ſpeciall ſuit to the King, and for a fine to be made in the Chancerie for it: but theſe Maximes be changed by Mag Chart. cap 16. Nulli negabimus, nulli vendemus rectum

v. Lib. Sect. 490. & 491. & lib 3. Ca. fo. 29. b. 2. no. 8. 151. a.

vel luſtic'. ¶ The Proceſſe in actions reall and perſonall are to be referred hither.

Cap. IX.

CAſes doubted whether they be only Maximes, or grounded vpon the Law of Reaſon. ¶ Hee that commandeth the treſpaſſe, is a Treſpaſſor. ¶ The Acceſſarie ſhall not be put to anſwer before the Principall. ¶ If an Abbot had bought a thing that had come to the vſe of the houſe, and died, his ſucceſſor ſhould be charged. ¶ He that hath the poſſeſſion of lands, though by diſſeiſin, hath right againſt all men, but him that hath the verie right. ¶ If an action reall be brought againſt him that hath nothing in the thing demanded, the Writ ſhall abate. ¶ The alienation of the Tenant hanging the Writ, nor his entrie into Religion, or if he be made a Knight, or being a woman take an husband, ſhall not abate the Writ. ¶ If lands & rent iſſuing out of the ſame come into one mans hands of like eſtate and ſuretie of title, the rent is extinct. ¶ If land deſcend to him that hath a former right, he

he ſhall be remitted to his better title, if he will. ¶ If two titles concurre, the eldeſt ſhall be preferred. ¶ A man ſhall yeeld dammages for the hurt of his beaſts in his neighbors ground, though he knew not they were there. ¶ If a Demandant or Plaintiffe enter into the thing demanded hanging his Writ, the Writ ſhall abate.

Cap. X.

PArticular Cuſtomes not being againſt the Law of Reaſon, nor of God, although againſt the Common Law, are holden for Law, and if it riſe in iſſue, whether there be any ſuch Particular Cuſtome or not, it ſhall be tried by Jurie, and not by the Judges: except the Cuſtome be of record in the ſame Court. Examples of Particular Cuſtomes. ¶ By a Cuſtome in Kent called Gauelkinde, all the brethren inherit together, as ſiſters at the Common Law. ¶ By a Cuſtom in Nottingham called Borough-engliſh, the youngeſt ſon ſhall inherit. ¶ In London, Free-men may by their Teſtaments inrolled bequeath their lands to whom they will, except

to Mortmaine, and being Citizens & Freemen to Mortmaine. ¶ In Gauelkinde though the father be hanged, the sonne shall inherit: for the Custome is, the father to the bough, the sonne to the plough. ¶ In some places the wife shall haue halfe the lands of her husband in name of her Dower, so long as she liueth sole. In some place the husband shall haue halfe the inheritance of the wife, though he had no issue by her. ¶ In some place an Infant when he is xv. yeares of age may make a feoffment, and in some place when he can measure an Ell of cloth.

Vt. 4. Co. 54. b. 98. Co. 124. a.

Cap. XI.

Statutes are made by the King (who is the head and most chiefe and principall part of the Parliament) the Lords spirituall and temporall, and the Commons assembled in Parliament, in cases where the Law of Reason, the Law of God, Customes, Maxims, nor other grounds of the Law seeme sufficient to punish the euill, and reward the good. And oftentimes two or three of these grounds of

of the Law of England muſt be ioyned together to maintaine the Plaintiffes action: As if a man enter into another mans land by force, and make a feoffment for maintenance to defraud the Plaintiffe of his action, here three grounds of the Law maintaine the Plaintiffes action of Treſpaſſe or Aſſiſe, viz. the Law of Reaſon, whereby the vnlawfull entrie is prohibited; the Statute of 8. H. 6. cap. 9. whereby treble dammages is giuen &c. and the Cuſtome of the Realme, which is, that the dammages ſhall bee aſſeſſed by Iurie.

Cap. XII.

If an action of Debt be brought vpon an Obligation, it is a Maxime, that the Defendant ſhall not plead that he owerh not the money, but muſt haue ſome ſufficient releaſe or acquittance in writing, or other matter of as high nature as the Obligation to plead in bar, the reaſon whereof is, to auoid the inconuenience that by Nude parol, or a bare auerment an Obligation ſhould elſe be auoided: But the Law intendeth not notwithſtanding, neither

v. 5. Co. 43. a. this offends 4. Ed. 3. fo. 37.

ther is that the money of right ought to be paid againe, where the partie taketh no acquittance or loseth the same, for that were against conscience, therefore if such matter happen, the partie hath his remedie by Subpœna: This case, as it seemeth is to be vnderstood of a single Obligation, for if it were with a penaltie, 41. E. 3 25. by Thorpe, and 46. E. 3. 29. and B. Fails 40. for that the Obligor is bound there on paine of forfeiture of the penaltie to pay, &c. at his perill, therefore he may plead payment without an acquitance: So it seemeth of an Annuitie with a Nomine pœnæ, otherwise not, vnlesse the Annuitie be by prescription, where in that he is not charged by deed, hee may discharge himselfe without deed, 37. H. 6. 19.

Cap. XIII.

What Conscience is after the opinion of Diuines, and that it may the better be vnderstood, first is shewed what Synderisis is, then what Reason is, then what Conscience is. ¶ Synderisis is a naturall power of the soule, set in the highest part

part thereof, moving it to good, and abhorring euill, and therefore Synderisis neuer sinneth nor erreth. This Synderisis is the beginning of all things that may be learned by speculation or studie, and ministreth the generall grounds thereof; And also of all things that are to be done by man, and is therefore called by some men the Law of Reason, for it ministreth the principles of the Law of Reason, which be in euerie man by nature, in that he is a reasonable creature.

Cap. XIV.

Reason is that which maketh man excell beasts, and like to the dignitie of Angels, discerning troth from falshood, euill from good. It is diuided into the higher part, which reasoneth by heauenly Lawes or Reason what is to be done, and into the lower part, which worketh in gouerning temporall things, and groundeth her reasons much vpon the Law of man, whereby she concludeth that this is expedient or not for the Common-wealth, so that these two being one in effect, differ by reason of their working.

Cap.

CAP. XV.

THe word Conſcience is compounded of Cum and Scientia, and is as much to ſay, as knowledge of one thing with another; Conſcience ſo taken is but an actuall applying of any knowledge to ſuch things as bee done, whereupon it followeth, that of the moſt perfect knowledge of any law or cunning, and of the moſt perfect and pure applying thereof to any particular act of man, followeth the moſt perfect and pure conſcience, and if there be default in knowledge of the truth of ſuch a Law, or in applying the ſame to particular acts, thereupon followeth an error in Conſcience. And God hath ſet Conſcience in the minds of everie reaſonable ſoule as a light, whereby hee may diſcerne what hee ought to doe, and what not.

CAP. XVI.

EQuitie is a right wiſenelle that conſidereth all the particular circumſtances of the Deed, the which alſo is tempered

tempered with mercie, and such an Equitie must be obserued in euerie generall rule of the Lawes of man, for Summum ius summa iniuria, viz. if thou take all that the words of the Law giueth thee, thou shalt sometimes doe against the Law, therefore Equitie was ordained to temper the rigor of the Law, and it is called by some Epicaia, which is no other thing but an exception of the Law of God, or of the Law of Reason, from the generall rules of the Law of man. which exception is secretly vnderstood in euerie generall rule of euerie positiue Law, and it taketh not away the verie right, but only that which seemeth to bee right by the generall words of the Law, for it followeth the intent though not the words thereof: and if any Law were made by man without any such exception expressed or implyed, it were vnreasonable. For example, In the Law of England there is a generall prohibition, that it shall not be lawfull for any man to enter into another mans Freehold without authoritie of the owner, or of the Law: yet is it excepted by the Law of Reason, that if beasts driuen by the high way escape into another mans

corne,

corne, he that driueth them may iuſtifie the entrie to fetch them out. Alſo notwithſtanding the Statute of 14. E. 3. that no man vpon paine of impriſonment ſhould giue almes to any valiant begger, yet he that meets ſuch an one ſo lightly apparelled in ſuch cold weather, that if he be not clothed, &c. he is likely to die before he come to any Towne, may cloth him by the Law of Reaſon. And the Iudges many times may iudge after the mindes of the makers of Statutes, ſo far as the letter may ſuffer.

Cap. XVII.

A Man may be holpen by Equitie in the Lawes of England in diuers Manners; First by particular grounds which are exceptions from the generall grounds of the Law: As where there is a general ground that it is not lawfull to enter vpon a Diſcent: yet an Infant, and he that maketh a Continuall Claime are excepted. So in diuers Statutes, as where by the Statute of Glouceſt. cap. 6. it is generally prohibited that certaine particular Tenants ſhall doe no waſte, yet if

if a leafe be made to an Infant within yeares of discretion, and a stranger doe waste, &c. the Infant shall not be punished but is excepted by the Law of Reason B.) Yet he shall be punished for his owne waste. So if a leafe bee made to a woman couert, she shall bee discharged of waste after her husbands death by a reasonable Maxime and Custome of the Realme, Also such particular Tenants may cut trees for reparations, and this seemeth to bee because by the mindes of the makers of the Statute this particular case should be excepted. So that a man may be excepted somtimes from the rigor of one Maxim by another Maxim: from the rigor of a Statute by the Law of Reason, and sometimes by the intent of the makers, And in all these cases the parties haue their helpe by the Common Law in the same Court: But where any thing is excepted from the generall Customes and Maxims of the Law of the Realme, by the Law of Reason remedie is giuen in Chancery by Subpena, if it lie in the case, and thereupon an Iniunction is obtained to stay proceedings at the Common Law: But in some cases there is no remedie but the

contra. Fitzh. fo. 54. a. Litera. 7. 8. fo. 44. b. 81.

Fitzh. 380. b. 9.

contra. Fitzh. 54. a. Litera. 8. 8. fo. 44. b.

Na. Ber. 59. F.

the conscience of the partie. And although of this terme Equitie there is no mention in the Lawes of England to the intent aboue said: But of an Equitie deriued vpon Statutes, yet of the effect of this Equitie mention is made, as when it is argued in the Lawes of England where a Subpena lieth and where not. And daily Lawyers exhibit bils in Chancerie for Subpena's, and the Law will that there shall bee such remedy in Chancerie in diuers cases grounded vpon Equities: And then the Lord Chancellor doth order his conscience after the grounds and rules of the Lawes of this Realme. But for that no record remaineth of such bils, nor of the Writ of Subpena or Iniunction sued thereupon, therefore such remedie in Chancerie vpon such Equities is not set here for a seuenth ground of the Law: But as a thing necessarily suffered by the Law.

Cap. XVIII.

If it were ordained by Statute that there should be no remedie vpon such Equities, as aboue said in Chancerie nor

nor elsewhere, such a Statute were against Reason and Conscience: But yet the Statute 4. H. 4. cap. 22. That Judgements given in the Kings Courts shall not be examined in the Chancerie, Parliament, nor elsewhere is a good Law, although thereby the mischiefe aboueſaid may happen; for it was made to eſchew the inconuenience that otherwiſe Plaintiffes, though vpon neuer ſo good a ground, ſhould ſeldome come to the effect of their ſuits: And inconueniences are more prouided for in the Lawes of England, than miſchiefes to particular perſons. Alſo the Statute prohibiteth not equitie, but only the examination of Judgements for the inconuenience aboueſaid. And in ſome caſes, as aforeſaid, there is no helpe by Subpena, nor otherwiſe for wrongs, but the conſcience of the partie: As if the Defendant in an Action brought vpon a true Debt will wage his Law: So if in an Attaint the Grand Jurie affirme the falſe verdict: Alſo where there can be no ſufficient proofe, there can be no remedie in Chancerie more than in the Spirituall Court.

Cap. XIX.

Where the Law shall be ruled after Conscience. This question is not understood of the Law of Reason or of the Law of God for they may not be left, nor of the Law of Man consonant unto them made in particular cases, for Conscience must be ruled after such Lawes, as appeareth in the next Chapter: But this question is diuersly to be understood; First, many erroneously thinke they may doe with good conscience all that they shall not be punished for by the Law, though the Law warrant them not to doe it; As if two Joyntenants be of a wood, and the one selleth the wood and detaines all the money, his fellow hath no remedie by Law, for by taking the wood iointly one put the other in trust, and the Law leaueth the profits to be ordred according to the trust: yet in conscience is he bound to restore halfe to his fellow, for that by Law he hath right to halfe the land: so there is no default in the Law, but in him that taketh all the profits, and therefore in this and other like

vide 6. lib. 2. fo. 68. a. Ed. Com. 247. a. et Fitzh. 109. E. *

like cases, the Law is not to be left for conscience, but the erroneous opinion abouesaid: So if Tenant in taile bee disseised, and the Disseisor dieth seised, and the Heire in taile bringeth his Formdon and recouereth the Land, though the Law giue him no dammages, yet in conscience the Tenant is to yeeld him dammages from the death of his Ancestor: So in other actions, whereby a man is to recouer his right and no dammages. ¶ Also by some the Law is to be left for Conscience, where it estops a man to deny that he hath before, ignorantly and not by his assent, affirmed in Court of Record, or concluded himselfe in otherwise; As if a daughter and heire sue inuerte with her bastard sister, &c. for though the Law in cases of Estoppel giue no remedie, yet it iudgeth not that the other hath right. So in case where a verdict passeth against the truth: for at the Common Law iudgement must be giuen as it is pleaded and tried, and in the Ciuill and Canon Law as it is pleaded and proued. ¶ Also the Law is to bee left for Conscience, where the cause of that Law doth cease; As if Lessee bringeth an Action of Trespasse a-

gainſt a ſtranger that doth waſte vpon the land, and hath iudgement of dammages hauing reſpect to the 3. dammages that he is to yeld to him in the reuerſion, and now he in the reuerſion dyeth before his action brought, whereby the action of waſte is extinct. ¶ Alſo where a Law is grounded vpon a preſumption, if the preſumption faile, the Law is not to be holden in Conſcience.

Cap. XX.

WHere Conſcience ſhall be ruled after the Law. This queſtion is not only to be vnderſtood of the Law of Reaſon, and of the Law of God; but alſo of the Lawes of man not contrarie vnto them; for ſuch Lawes made by man, that hath thereunto receiued power from God, are made by God. Caſes of our Law, where Conſcience ſhall be ruled after the Law. ¶ The eldeſt ſon ſhall inherit at the Common Law, in Borough-engliſh the youngeſt, in Gauelkinde all the brothers, as daughters ſhall at the Common Law; and ſo ſhall they in Conſcience, and yet no reaſon

reason can be giuen why Conscience should so varie, but that the Law of England, by reason of diuers Customes, doth so varie. ¶ If a man make a feoffment of two Acres lying in seuerall Counties, and Liuerie in one in name of both, the Acre passeth only where the Liuerie was made, but if both Acres had been in the same Countie, both had passed, and being put without consideration, the diuersitie of the Law maketh the diuersitie of Conscience. ¶ So if a man make a feoffment of a Manor without the words Cum pertinent', the Demesns and rents passe with Attornement: So of Common pertaining to the Manor, but not Villeines regardant, nor Aduowsons appendant, but with the words Cum pertin. they had passed. (B. So though the words come after the *Habendum*, as Habendum, &c. vnà cum aduoc', or Habendum. &c. cum pertin.) But if the King had beene the Grantor, the generall words cum pertin. passe not the Aduowsons nor Villeines, and the diuersitie of Law in these cases (put without consideration) make the diuersitie of Conscience. ¶ So if a man make a Lease for yeares, yeelding to him and to his

Perkins Sect. 116. fo. 24. a. 26. Entr. Conu. 180. 9 Eliz. f. 307. Entr. Conu. 180. Fitz. Abr. 121. b. 10. Co. 63. b. retaine but may say in Pleading that he claimed

heires a rent, vpon condition that if it be behinde by the space of xl. daies, &c. that it shall be lawfull to the Lessor and to his heires to re-enter, the rent is behinde, &c. and demanded by the Lessor (as it ought by the Law) and is not paid, and now the Lessor dieth, his heire may here enter, for a title of Entrie descends: but if the Lessor had died after the Feast day, and before the fortieth day, and the heire there makes a demand at the fortieth day, in this case he may not enter for nonpayment, neither in Law nor Conscience. ¶ So if Tenant in Dower sow the land, and die before severance, the corne belongs to her Executors, and not to him in reuersion: Otherwise it is of grasse and fruits. (B. If Tenant in Dower sow the land, and now takes an husband, and the husband dieth before severance, the wife shall haue the emblements, and not the Executor of the husband: * But if the husband had sowed the Land, otherwise it is.) ¶ If before the Statute of 32. H. 8. a man seised in fee had deuised his land and died, his heire had right to the land, for the will was void, but by Cestuy que vse it had been good: So in Conscience.

* Fitzherb. 55. b. t. vo office of Executors fo. 73.

* Perkins. fo. 99.

Conſcience. ¶ A man grants a rent for life, and leaſeth land to the ſame Grantee for life alſo, the Tenant alieneth both in fee, he in reuerſion hath good title to the land for a forfeiture, but not to the rent: So in Conſcience. ¶ If lands be giuen to two men and a woman in fee, and after one of them marrieth the woman, and alieneth the land and dieth, the woman hath right but to a third part: But if the intermarriage had beene before the feoffment, ſhe had had right to halfe the land: So in Conſcience. ¶ If a man haue two ſonnes, one before, the other after eſpouſals, and dieth, the younger is his heire, for hee beene before eſpouſals is in our Law baſtard: So in Conſcience. So that where any Law is ordained by man for the diſpoſition of lands or goods, not being againſt the Law of Reaſon, nor of God, it bindeth alſo in the Court of Conſcience.

Cap. XXI.

AN Infant of the age of twentie yeares ſelleth his land, and with the money buyeth other Lands of

greater value, his feoffment is notwithstanding voidable in Law; for the Law presumeth that an Infant hath not discretion to order himselfe. (Note notwithstanding the presumption be here against manifest proofe.) And here the Feoffee cannot be holpen in Conscience, for that Conscience here can be grounded upon no Law; for though contracts be by Ius Gentium, yet they be not grounded upon the Law of Reason, nor of God: But the partie is in Conscience bound here only to restore the money and expences. But if a man by a lawfull contract selleth lands, (but the contract of an Infant is void) though the solemnities of Liverie, &c. be wanting, yet the Bargainor is there bound in Conscience to performe the contract.

Cap. XXII.

Tenant for life is impanelled on an Inquest, and loseth Issues and dieth, the Land shall be charged with these issues, and they shall be levied on him in the reversion; So if the husband forfeit issues and die, they may be levied on the land of the wife, which

which is by a particular Maxime of the Law. being an exception from the general Maxime, That where two titles concurre the eldeſt ſhall bee preferred: So likewiſe in Conſcience, for the Law being that for the execution of Juſtice euerie man ſhall bee impanelled, it is reaſonable there ſhould be a paine to cauſe him to appeare, which is by forfeiture of iſſues to the King, which is not inconuenient, though the Law be, that they ſhall be leuied of him in the reuerſion; for ſuch a condition was ſecretly vnderſtood to paſſe with the Leaſe, which the Leſſor is to preuent at the making thereof. B.) It ſeemeth hereby that iſſues loſt by Tenant in taile ſhall bee leuied vpon the iſſue.

Cap. XXIII.

TEnant for life or yeares doth waſte, whereby he is to forfeit treble Dammages, and the place waſted by the Law, til Judgement it ſufficeth in conſcience that he be ready to yeeld Dammages according to the waſte, and not the treble Dammages, becauſe they were vncertaine, but after

after Iudgement he is bound in conscience to yeeld the treble Dammages and place wasted. So in all popular Statutes, no man is bound in conscience to pay the penaltie till it be recouered by Law: And he that hath offended such a Statute may not in conscience defend the action and hinder Iudgement, to the intent to pay only single Dammages, vnlesse hee haue a true Dilatory, which would be hurtfull vnto him if he pleaded it not.

Cap. XXIV.

A Feoffment vpon Condition, that the Feoffee shall not infeoffe any other, the Condition is void in Law, for it is incident to the purtie of a Fæsimple, that he may by the Law, and by the gift of the Feoffor make a feoffment, so that the Condition being contrarie to the Law, and contrarie to his owne former grant is void in Law: but vpon condition that hee should not infeoffe such a particular person, had beene good. And the intent of the parties not according to the Law is void: As if a man intending to giue a Fæsimple, giueth the land,

Habendum

Habendum to him for euer, an eſtate for life only paſſeth: So if a Leaſe for yeares be made to a man and his heires, his intent is voyd; for by the Law all Chattels reals and perſonals goe to the Executors: So if land be giuen to a man and his wife, and a third perſon, intending each ſhould haue a third part, the husband and wife as one perſon in Law ſhall take but the moitie: So alſo in conſcience the eſtates being put without recompence: then alſo is the condition ſupra void in Conſcience; For if the Feoffor ſhould haue the land againe in conſcience, that conſcience can be grounded vpon no Law, for Conditions are not grounded vpon the Law of Reaſon, but vpon the Cuſtome of the Realme.

Cap. XXV.

IF a Fine with Proclamation be leuied according to the Statute of 4. H. 7. and no claime made within fiue yeares the right of a ſtranger to the fine is thereby extinct: So in conſcience: for the Statute was made for eſtabliſhing the right of lands, and for a peace

peace and quietnesse to the people, which is a good Law, though percase it extinct the right of a stranger, and must be kept in the Court of Conscience, for possessions and the right thereof are subiect to the Law, and with cause reasonable may be translated from one to another by Act of the Law, vpon which reason by contracts in Faires and Markets the propertie is altered (except the propertie bee to the King) so the Buyer pay toll or doe other such things accustomed, and haue no notice of the former propertie. And in the Ciuill Law a possession of another mans goods three yeares thinking he hath title, giueth the verie right in deed.

3. Co. 78. b. & Perkins fo. 20. a.

Cap. XXVI.

A Recouerie vsed vpon alienation of intailed lands, for cutting off the intaile is in this manner; The Demandant shall suppose in his writ and Declaration, that the Tenant in Taile hath no Entrie but by such a Stranger, where neither the Demandant nor the said Stranger neuer had possession of the land, whereupon the Tenant

Tenant in taile shall appeare, and by assent of the parties shall vouch the common Vouchee, whom he knoweth to haue nothing to yeild in value, and the Vouchee shall appeare, and the Demandant shall declare against him, whereupon he shall take day to imparle in the same Terme, and at the day by assent of the parties hee shall make default, whereupon because it is a default in despite of the Court, the Demandant shall haue Judgement to recouer against the Tenant in taile, and he ouer in value against the Vouchee: And this Judgement and Recouerie in value is taken for a bar of the Taile for euer by reason of the recompence; for by presumption the Vouchee may purchase lands. But it is reasoned, that although such Recoueries, in respect of the multitude of them, be spared, that they stand not with Conscience: for by the Statute of W. 2. cap. 1. when the Ancestor is dead, intailed lands of right belong to the heire, for that hee is heire according to the gift: If then thou be commanded not to couet: a fortiore that thou doe not withhold thy neighbours house, &c. Also all Commandements of the Law of man lawfully made, binde

lib. 10. fo. 40. a. marion

binde in Court of Conſcience, and although the Statute ſhould be iudged to be made of ſingularitie by ſome of the Parliament, for aduancement of their bloud; yet inaſmuch as it is not againſt the Law of God, nor the Law of Reaſon, it ought to bee obſerued. And although it may be obiected, that that which is ordained by the Law may be annulled by the Law, there is not here like authoritie for the one as for the other; for the Taile is created by authoritie of Parliament, the moſt high Court in the Realme, and the diſanulling thereof is by a common recouerie vpon falſe ſuppoſals. And the Statute of 7. H. 8. which ſome take to be an allowance or fortification to theſe recoueries, fortifies them not at all; for the Statute giues only a forme to recouerers to anow which they had not before, as Grantees of reuerſions had. becauſe the recouerer comes in in diſaffirmance of the ſtate of him againſt whom, &c. ſo that the Statute reſpecteth not whether the recouerie be againſt Tenant in Fee or in Taile, or whether it were vpon a good title or not. Then as to another obiection, viz. Communis error facit ius, that is to bee vnderſtood that a

Cuſtome

Fo. 124. b.

Custome vsed against the Law of man in some Countrey shall be taken for a Law, if the inhabitants be suffered so to continue it; but these recoueries, although they haue beene long vsed, haue alwayes beene spoken against: Also this Custome could haue no lawfull beginning, and an euill Custome is to be abolished: Also a prescription against a Statute is void: And it is also moued, that inasmuch as there is no executed recompence that the Law hath beene taken, that the heire in taile is not barred of his Formdon, and although the Mouchée may purchase lands after the issue hath recontinued his owne land, that herein is no inconuenience; for that the issue shall be barred of the recompence in value, in that he hath recontinued his owne land againe, and so shall not haue both.

Cap. XXVII.

A Disseisor makes a gift in taile, the Donee agreeth with the Disseisee, that in consideration of a release of his right, hee shall haue a Rentcharge out of the land, and a common

Recouerie

Recouerie is had against the Donee, to the vse of payment of the said rent, and of the former intaile: This Recouerie stands well with Law and Conscience, for that it is had for surctie of the intaile, which the Disseisee might haue defeated; And if his grant had beene but by deed, being vpon such consideration, it had bound the heires in taile. Octauian Lumberds case. 44. E. 3.

Cap. XXVIII.

TEnant in Taile sufferreth a Recouerie to the vse of a woman (whom he intendeth to marrie) for life, and after to the vse of the first Intaile, this Recouerie stands in conscience as the first Recouerie; for the intent of the Statute is, that the land should continually remaine in the heires in Taile, as long as the Taile indureth, and no Joynture can bee made by Recouerie or Deed; but the Taile must be discontinued, and no intent can be taken against the expresse words of a Statute: And this is not like the cases of Tenant in Dower, and Tenant by the Curtesie, which shall

shall be though the Taile be determined; for they grow most specially by the continuance of the possession in the Heires in Taile, and in those cases the intent of the Statute shall not be taken to put away such titles as the Law should giue by reason of the Taile, though the words bee that those to whom the Tenements be so giuen, shall not haue power to alien, &c. The words that he shall not haue power, &c. are intended bee not his Heires, &c.

CAP XXIX.

A Man makes a Feoffment to the intent that the Feoffees shall reassure the land to him in Taile, which is done accordingly, after the Donee falleth in debt, and his bodie is taken in execution, whereupon for payment of his debts he sels the land by Recoverie, this Recouerie stands in consistence as the first; for though it may be supposed, that a man will not so much regard the wealth of his Heire, that he will forget himselfe, and though hee also declare his intent so vpon his Liuerie, the intent is contrarie to the

gift, and a condition or intent declared or reserued against the estate that a man makes, is void in Law: As where a man makes a feoffment vpon condition, the Feoffee shall not alien; And like as in a Fee simple there is incident a power to alien, so in a State taile there is a secret intent vnderstood in the gift that he shall not alien, then such an intent supra being void in Law is also void in Conscience. The Law that the bodie of a Debtor shall lie in Execution till hee haue satisfied the debt, standeth well with Conscience, and a Law that he may cedere bonis, viz. Waiue his goods, and so bee discharged, were not indifferent; for so hee may conceale his chiefe wealth from his Creditors, and though the Creditor know hee haue nothing wherewithall to make satisfaction, it is more conuenient it should be left to the conscience of the Creditor, in whom is no default, than to the Debtors conscience; and if the Creditor know that by some casuall meanes he is fallen in decay, he is bound in Conscience, though not by the Law, to set him at libertie.

CAP. XXX.

AN Annuitie is granted to a man and the heires of his bodie, to perceiue of the coffers of the Grantor, the Grantee suffers a common Recouerie in a Writ of Entrie by the name of a rent in D. of like summe, intending that the Annuitie should bee recouered: This Recouerie bindeth not the Heire in Taile, in Law nor Conscience; for a Writ of Entrie lies not of an Annuitie, therefore it cannot be intended of the Annuitie: But if it had beene of a rent issuing out of land, it had beene of like effect, as the aboue said Recoueries of land. There be twoo diuersities betweene a Rent and an Annuitie, namely a Rent is issuing out of land, an Annuitie chargeth only the person of the Grantor and his Heires, hauing Assets by Discent, or the house if it be granted by an house of religion, to perceiue of their coffers. Also of an Annuitie lieth no other action, but only a Writ of Annuitie, and this against the Grantor, his Heires or Successors, but of a rent the same actions lie as for land,

F. fol. 144. b.

and they be brought sometimes against the Ter-tenant, sometimes against a Parnor, and sometimes against neither; for of a Rent seruice it is brought sometime against the Mesne and the Disseisor, and sometimes against the Mesne alone if he did the Disseisin. Also an Annuitie is no Assets, nor Freehold in Law, neither shall it be put in Execution vpon a Statute or Elegit, as a Rent shall, for it is but Chose in action.

Cap. XXXI.

v. Mich. 28. 29 a. 61. a

A Woman Tenant in Taile within the Statute of 11. H. 7. sufferreth a Recouerie, and after her sonne and heire apparant releaseth to the recouerer by fine, and dies, liuing his mother, hauing another brother, and now the mother dieth, the brother as it seemeth cannot enter; for such a Recouerie with assent of the heire, so the agreement be of Record, is affirmed by the Statute, and a Fine is one of the highest Records in the Law, so now he hath right both by the Recouerie and the Statute, yet for that the Fine was leuied after the title giuen

nen of Entric, and that the assent was not at the time of the Recouerie as in comming in as Mouchee, quære. (B. This assent comming after, cannot make good that void before.) But if the elder brother had died, and the second brother had released by Fine, that should not barre his Issue of his title of Entrie. And note notwithstanding the Statute of 11. doth not prohibit other Recoueries but of Joyntures, yet it is not to be vnderstood to allow of Recoueries of other Estates taile, no more than it doth allow of Recouenes of Joyntures suffered before the day limited by the Statute, but leaues them of the same effect as they were before, sparing both for the multitude of them, and yet not comforting any to take them after.

Cap. XXXII.

TEnant in Taile is disseised and dies, and an Ancestor collaterall to the heire in Taile releases with Warrantie, and dies, and the Warrantie descends vpon the heire in Taile, hee is thereby barred in Law, and in Conscience also, as it seemeth; The rea-

son, because by an ancient Maxime, a collaterall Warrantie barres aswell a State taile, as a Fee simple, and it is not remedied by the Statute of West. 2. In exhortation that all Estates taile should be made Fee simple, or else to make the Taile so strong, that they may not be cut off by common Recoverie, Fine with Proclamation, Collaterall Warrantie, nor otherwise, to the scruple of many mens consciences.

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¶ The second Booke.

Cap. I.

TEnant after possibilitie commits waste, it is Litt. sect. 74. dispunishable by the Law, for the authoritie that he had by the gift in Taile to doe waste continueth, as long as the gift and the Liuerie made thereupon continue, and hee may cut downe trees, and doe all things as Lesse for life without impeachment of waste, and such words without impeachment, &c. in the gift in Taile had been void, because it is but that which the Law gines: and for that the state continues, he shall not haue aid as Tenant for life shall: yet if he make a Feoffment, because it is to the disinheri- 11. Co. 80. a.

Litt. Sect. 34.

tance of him in the reuersion it is a forfeiture, as it is of Tenant for life: Also the Donor shall be receiued if hee make default, &c. but that is by the Statute of West. 2. Also Tenant for life nor yeares were not punishable for waste at the Common Law (though it were against conscience for them to doe it) the reason, because they had their estates by grant of the partie, whose folly it was he prouided not against waste at the making of the Lease: But if Tenant by the Curtesie or Tenant in Dower did waste,

v. 4. Co. 62. b.

a Prohibition of waste lay at the Common Law (where he in the reuersion should recouer single damma-

a. Ka. Br. 55. c. 8 Co. 37. b. 12. Co. 116. b. 11. Co. 82. a. Fitzh. 53. b. 4. 354. b. 1.

ges) for their estate being created by the Law, the Law prouided that they should doe no waste, destroying of houses, cutting downe trees, and digging grauell are waste. If Cestuy que vse for life had committed waste, hee was dispunishable in Law, though he offended in Conscience. And Tenant after possibilitie may not with good Conscience, though he be dispunishable in Law, do all manner waste, as pull downe houses, and make pastures of Cities and Townes: And so some haue thought of Tenant in

v. 4. Co. 70. b. Fitzh. 140. 53. b. 1.

Fee,

fee, that he cannot with conscience destroy his woods and cole-pits, whereby the whole Country for their money haue had fuell, and yet if he doe, he is not bound to make restitution to any person certaine.

Cap. II.

This terme, At the Common Law, is taken in three manners; First, as the Law of this Realme of England discerned from all other Lawes; And so it is often argued what ought to bee determined by the Common Law, and what in the Admiralty or Spirituall Court: Also if an Obligation beare date out of the Realme, it is said, it is not pleadable at the Common Law. Secondly, it is taken for the Kings Courts of his Bench and Common Pleas, as when a Plee is remoued out of ancient Demesne, for that the Land is Frankfee, and pleadable at the Common Law, viz. in the Kings Courts, and not in ancient Demesne: So is it often pleaded in base Courts, as Court Baron, Countie Court, and Court of Pypowders, that it ought not to bee deter-

determined there, but at the Common Law, viz. in the Kings Courts. Thirdly, At the Common Law, is as much to say, as before such a Statute made, as appeareth in the precedent Chapter.

Cap. III.

If a man be Outlawed in a personall action (although without notice) the propertie of his goods is altered, and given to the King: For by an old Custome and Maxime in the Law, he that is Outlawed shall forfeit his goods to the King. The beginning of which Maxime was upon this reason; No man shall be condemned in our Law without answer, or that hee appeare and will not answer, wherefore when one hath done a trespasse, &c. If this Proceſſe had not beene, and the Defendant had no lands, there had beene no remedie if hee would not appeare upon an action brought against him, therefore it hath been used time out of minde, that if upon an Attachment directed against the Defendant, returnable in either Bench, it be returned Nihil, &c. then shall goe out a

Capias

Capias to take his bodie, and thereupon an Alias and Plur', which if they be returned Non est inuentus, and hee appeareth not, then an Exigent shall goe forth against him, which shall haue so long a day of returne, that fiue Counties may be holden in the meane time, in euerie of which Counties he shall be solemnly called, and then if hee appeare not, the Coroners shall giue iudgement of Outlawrie against him: By which Outlawrie he loseth his goods and diuers aduantages in Law for his contempt: which said Processe was well deuised for the execution of Iustice, &c. And if the partie haue giuen cause of action, hee should take notice of the suit at his perill: If not, yet the King in Iustice is bound to grant Processe vpon surmise of the Plaintiffe, without other examination of the cause, than by the pleadings of the parties, and here the Defendant is put to his action of the Case against him that caused him to be outlawed vpon an vntrue action, but if he die before the action brought, Actio moritur cum persona: But if the partie had beene returned quintus exactus, where in deed he was neuer called, there it seemeth the partie hath remedie by petition

lib. 9. 87. a. post. ca. 10. Stanf. 1. Cor. 59. 3.

tition to the King, especially if he that made the returne be insufficient, or die before recompence made. For further notice to the partie, it is ordained by the Statute of 6. H. 8. that a Writ of Proclamation shall goe out, if the partie inhabit in a forreine Countie. (See also now a new Statute of 29. Eliz.) And in diuers other cases also a man may lose the propertie of his goods without notice; As if they bee sold in Market ouert. Also goods stollen and seised for the King, or waiued and seised as Waife, by one that hath Waifes, are forfeited, vnlesse the Owner sue an Appeale, &c. (But see the Statute of 21. H. 8. 11. that if the partie giue euidence vpon arraignment of the Felon vpon an Indictment, and the Felon is attainted that he shall haue restitution of his goods, as if he had sued an Appeale.) So of Strayes that are proclaimed and not claimed within the yeare. So are Deodands, to whomsoeuer the propertie were, which shall be disposed of, &c. Also a Fine with Non-claime within the yeare, was a bar to demand the lands at the Common Law, and now by the Statute of 4. H. 7. by Non-claime within fiue yeares. And the

5. Co. 109. a. b. & Stanf. pl. Cor. 66. C.

reason

reaſon that a propertie may be ſo alte-red is, for that the Law of propertie is not meerely the Law of Reaſon nor of God, but the Law of man concur-ring with them, then the Law of man giuing the propertie, may limit the gift or condition with it, and it will ſtand well with conſcience.

Cap. IV.

A Stranger doth waſte in lands leſſed for life, he in the reuerſion ſhall recouer againſt the Tenant for life the place waſted, and treble dam-mage, although he were ignorant of the waſte, and although the ſtranger be not ſufficient to make him recom-pence, and this both in Law and Con-ſcience. The reaſon is, that at the Common Law, Tenant in Dower and Tenant by the Curteſie tooke the Land with this charge, That they ſhould doe no waſte, nor ſuffer none to be done, and when the Action of waſte is after giuen by the Statute of Gloceſt. cap. 5. againſt Tenant for life and yeares, they were euer after taken to be concerning waſte, in like caſe as Tenant by the Curteſie, &c. for after

the

the Action giuen against them, no reason can be assigned, why they should haue more fauour, and there is a Maxime, that of like Cases, like Law, note the Statute being penall. And as to the insufficiencie of the stranger, it is for a Common-wealth that waste should not be done, which is more fauoured in Law than the particular case of any man: Also it is the folly of the party to take such an estate, and folly may preiudice the partie, as if a Termor binde himselfe in an Obligation to leaue the land, &c. in as good case, &c. And although it may be obiected, that although a woman may waiue her Dower, yet Tenant by the Curtesie cannot waiue his estate; for by Act of the Law the estate continues in him after the death of his wife without Entrie, and therefore folly cannot be assigned in him, or percase he was an Infant, or the land descended to his wife after marriage, yet there is greater reason that the Tenant should be charged with such a waste, than he in reuersion disherited and haue no remedie, nor yet the profit of the land as the other hath: But if the Tenant for life had beene bound in an Obligation, that he should doe

5 Co. 21 a.

no

no waste, his Obligation had not been forfeited by the waste of a Stranger. Also Tenant for life shall not be punished for waste done by enemies or sudden tempest; but the reason hereof is not, because he can have no recompence ouer, but by a reasonable Maxime in that behalfe.

10. Co. 139. b. Pl. Com. 29. a. Ya. Br. 59. l. Dyer. 147. a.

Cap. V.

If a verie heire be certified Bastard by the Ordinarie, if after he bring another action against any other as heire, they may have by the Law the aduantage to plead the same Certificate in bar, two reasons: One, for that by a Maxime in the Law, a mischiefe shall rather be suffered than an inconuenience; for perchance, if another Writ should be directed to a new Ordinarie, he would certifie him Mulier, whom the other had certified Bastard in the same Court, for auoyding of which contrarietie, &c. Another cause, for that the Certificate of the Ordinarie is the most high triall in this case in the Law, but then it must bee vnderstood where Bastardie is alleaged in one that is partie to the Writ; for

if

if it be alleaged in a ſtranger, as Prie in aid, Voucher, &c. that ſhall be tried by Iurie, which is no concluſion to the ſtranger, becauſe he is not priuie to the triall, neither may haue an Attaint, but he that is partie to the iſſue may haue an Attaint, and therefore ſhall be concluded: Yet it ſeemeth that he that hath barred the Demandant by ſuch a Certificate, knowing him to be verie Heire, cannot retaine the land in conſcience, though there be no Law to compell him to reſtore it. It is alſo reaſoned, that a Lawyer if hee knew the truth, viz. that he is not Baſtard, ought not to giue counſell, though it be according to the Law, to plead it, for two reaſons: The one, by the Law of Reaſon he is bound to doe as he would be done vnto: The other, he thereby giues his Client a libertie, to chuſe whether he will reſtore, and thereby puts himſelfe to ieopardie of another mans conſcience, Et qui amat periculum, in illo peribit, and although there were none other to plead it, ſo that by his refuſing the inconuenience ſupra muſt follow, for that charitie beginneth at himſelfe, he ought rather to ſuffer all other offences, than himſelfe would offend.

Cap.

Cap. VI.

A Lawyer knowing that the Defendant hath ſufficient matter to be diſcharged by Subpena, which hee cannot plead at the Common Law (as in the caſe ſupra, Lib. 1. cap. 12. in an Action of Debt vpon an Obligation, where the Defendant hath loſt his acquittance) may not in conſcience be of counſell with the Plaintiffe in the Action at the Common Law; And though he be ſworne to giue counſell according to the Law, as Sergeants at the Law be, that oath is to be vnderſtood aſwell according to the Law of God and of Reaſon, being two ſpeciall grounds of the Law of England, as of the Law poſitiue, and by both thoſe Lawes a man muſt doe as hee would be done vnto; Alſo by the Law of Reaſon, Nihil poſſumus contra veritatem. Where by ſuch an Action hee muſt ſuppoſe and auerre, that it is a verie due Debt, and that the Defendant withholdeth it from him vnlawfully: And although the Defendant may haue remedie by Subpena, and it may be ſaid that this is the way to in-

duce him to his Subpena, this course is chargeable to the Defendant, and profes may die.

Cap. VII.

Before 27. Cestuy que vse puts in his beasts to manure the ground, and the Feoffee distraines them damage feasant, whereupon Cestuy que vse brings an Action of Trespasse against the Feoffee, which will not lie; for he had nothing in the land, but his remedie had beene by Subpena in the Chancerie, to cause the Feoffee to reinfeoffe him: And although after the Statute of R. 3. he might make a feoffment, yet for the profits he had no other remedie than before. In this Action of Trespasse, the Lawyer may with good conscience, knowing his right, be of counsell against the Action, and be with the Plaintiffe in the Chancerie without contrarietie, for the suppolall of the Action of Trespasse was vntrue in cuerie point, as to the Common Law, and then in being of counsell hee resisteth not the Plaintiffe to haue the profits, but only to maintaine an vntrue action for them:

them: So where one hath right to land, as heire to his father, and will bring an action as heire to his mother: And so a man may giue counsell in Dilatories, whereby the partie may take hurt, if they were not pleaded, though he know the Plaintiffe haue right, as misnaming the partie, or towne, or mistaking the degrees in a writ of Entrie: But otherwise, if the partie should take no hurt by admitting a Dilatorie, as to plead in abatement of a Foremdon in Discender, because the Demandant hath not made himselfe heire to him that was last seised, or in a Writ of Right, for that the Demandant hath omitted one that tended right, &c. And he may not with conscience, knowing the Demandant hath right, assent to the casting an Essoin, or Protection, nor vouch for the Tenant, vnlesse hee know he haue true cause of voucher and lien, neither pray in aid for him, vnlesse the Prior haue good cause of voucher and lien ouer, or that he hath somewhat to plead, that the Tenant may not, as Villenage in the Demandant. &c. And a man with conscience may be of counsell with him, that hath land by a Discent, or by a

Diſcontinuance without title, if hee that hath right bring not his action according to the Law.

CAP. VIII.

A Man diſtraines for Debt vpon an Obligation or Contract, and detaines the Diſtreſſe vntill he be ſatisfied of his Debt, he is in conſcience to make recompence of the ſum and dammages, for although the debt be certaine, being receiued without dammages (and is not as if it had beene for a treſpaſſe or dammages, which are arbitrable, and no man ſhall be his owne Iudge) yet becauſe this being a dutie is receiued by vndue meanes, viz. by Diſtreſſe, it cannot be intended the debt, but the partie diſtrained may haue a ſpeciall Writ of Treſpaſſe of his beaſts taken and detained, vntill a Fine made, by which he ſhall recouer dammages for the taking, and alſo the ſum receiued, ſo that hee is but a wrong doer: But it ſeemeth the Defendant is reſtored to his firſt action, as it is where a Iudgement in Treſpaſſe is reuerſed by error, and the dammages recouered repaied.

CAP.

Cap. IX.

For what a man may Diſtraine. ¶ A man may diſtraine of common right for a Rent ſeruice, & all manner ſeruices, as Homage, Fealtie, Eſcuage, Suit, &c. alſo for a rent reſerued on a particular eſtate, if he reſerue the reuerſion. ¶ If a Feoffment be made reſeruing a rent, he cannot diſtraine without a clauſe of Diſtreſſe, and if the Feoffment be not by Indenture, the reſeruation is void in Law. Like Law where a particular eſtate is made reſeruing a rent, the remainder ouer in fee. ¶ Tenant for life grants his whole eſtate reſeruing a rent, it is a void reſeruation, if it be not by Deed indented, and without a clauſe of Diſtreſſe it is a Rent ſecke. ¶ For an Amercement in a Leet the Lord may diſtraine, but not in a Court Baron. ¶ A leaſe at Michaelmas for a yeare, rendring a rent at the Annunciation and Michaelmas, he may diſtraine at the Annunciation, but not at Michaelmas, becauſe the terme is expired: But if it be payable at Midſummer and Chriſtmas, other-

but by Prescription or Custom 2. Inſtit. 47. b.

wise it is during the terme. ¶ So if Tenant pur auter vie makes a Lease for yeares, reseruing a rent, Cestuy que vie dieth, he cannot distraine, because his reuersion is determined. ¶ Cestuy que vse before 27. H. 8. makes a Lease for yeares or life reseruing a rent, it is a good reseruation, and the Lessor should distraine. ¶ If a Township be amerced, and neighbors by assent assesse a certaine summe vpon euerie inhabitant, and it is agreed, that if it be not paid by such a day, that certaine persons thereto appointed shall distraine, such Distresse is lawfull. ¶ Lord and Tenant by fealtie and rent, the Lord grants the fealtie reseruing the rent, and the Tenant attorns, the Lord cannot now distraine for the rent, for it is Secke: But if a man make a gift in Taile reseruing fealtie and rent, and after grants the fealtie reseruing the rent and reuersion, here he shall distraine for the rent, for the fealtie is incident to the reuersion, and cannot be granted. ¶ For Heriot seruice the Lord may distraine, but for Heriot custome he must seise and not distraine. ¶ For rent granted vpon Egaltie of partition, or of Dower, the partie may distraine. ¶ A man in no

case

ease may distraine in the night but for dammage feasant. ¶ For waste, reparations, accompt, debt, &c. a man may not distraine.

Fitz.lib.142.d. v.7.Co.7.a. 9.Co.66.a.

CAP. X.

A Man commits a Trespasse and dies, his Executors are not chargeable in Law, for Actio moritur cum persona, neither upon a simple contract made by the Testator, and therefore if they make amends for this, before debts or legacies paid, it is a Deuastauit: But after such things discharged, whereof they are chargeable in Law, of their charitable acts for the Testator, these ought first to be satisfied in conscience, and the debt first because it is certaine, and the trespasse arbitrable: But necessarie funerall expences must be allowed before all other things: And so it seemeth of the Probate, vnlesse there be not sufficient besides to pay the debts & funerals, and then the Ordinarie will pardon it. And it seemeth, that making Executors and their authoritie is by the Custome of the Realme, although it be vsed in all Countries, and not by

11.Co.45.b. Stanf.pl.Cor.59.S. v.Co.8.126.a. Cro. Eliz. 780. London. 1.Co.99.88.b. 9.Co.37. doit estre paye le vne et en gard tonne fee.

the Law of Reason, for before the Law of property there were no wils. And in some place, by a particular Custome, the Heire shall haue the goods and chattels reall and personall, which by the generall Custome goe to the Executors. And after all debts and legacies paid, Executors shall haue actions for debts due to the Testator, and those debts they shall haue to the vse of the Testator, and not to their owne vse. If the Testator die indebted by Obligation in seuerall summes of £. li. the peece to two, hauing goods but to the value of £. li. the Executor may pay which of them hee will. (B. So if they bring their actions seuerally at an instant.) But if one obtaine a Iudgement before another, hee must bee first paid. Executors may fauor one to confesse his action, and vse lawfull delayes by Essoin, Imparlance, &c. to the other, so that though one commence his action first, another may first obtaine a Iudgement. After an action commenced, that debt must be paid before a debt vpon an Obligation, except the other bring his action, and recouer hanging the first action, and that without couin: Neither must they

pay

pay debts vpon Obligations, where-of the day is not come, where others are already due, but when the day is incurred, that which was last due may be first paid, if no action be commenced for the first: though an action be commenced, yet they may confesse an action brought for the debt last due, that he may haue Iudgement first. But in conscience the Executors should respect which debt grew vpon the clearest cause, if they grew vpon equall cause, then who hath most need: The said confessing the action, and delaying the other, cannot bee said couin; for couin is where the action is false, & not where the Executor beares a lawfull fauor. The remedie for Legacies is by the Law Spirituall. The Ordinarie cannot cause Executors to accompt contrarie to the order of the Common Law.

Cap. XI.

A Man indebted x. li. vpon a Simple Contract, by his Will doth bequeath x. li. to I. S. and dieth, leauing goods only to burie him with, and to performe the Legacie, and

and the Executor deliuers the goods in performance of the bequest to I. S. although the Executor were bound to pay the Legacie (for that hee is not chargeable in Law with the debt vpon the simple Contract) yet it seemeth I. S. is bound in conscience to pay the debt vpon the simple Contract, vnlesse the Legacie were giuen him in satisfaction of some dutie: But if the debt had beene due by Obligation, he to whom the Legacie was paid, had not beene bound in conscience to pay that debt, for that the Executor is chargeable of his owne goods for paying legacies before debts, and there he that had the legacie is bound in conscience only to repay that he receiued to the Executors: But in Law in the principall case otherwise it is; for none in Law is to pay debts of the dead, but Ordinarie, Executor, and Administrator, for the person was chargeable of the Testator, and Executors hauing goods representent his estate, and be chargeable, and not the goods; for if the Executor giue the goods, the Donee is not chargeable with the debts, but the Executor of his owne. So if A. be indebted to B. and B. is indebted to C. and B. dieth intestate,

intestate, having no other goods but that which A. oweth him, C. hath no remedie till the Administration granted, and that the Administrator recouers against A. That debts shall be paid before legacies, is both by the Law of Reason, and the Law of God. Like conscience vt supra, where the Testator had done a Trespasse, wherupon he ought to haue made restitution.

Cap. XII.

A Man dieth seised of land in fee hauing two sonnes, a stranger abates, the eldest sonne dies without issue, the younger shall haue his Mordancester, as sonne and heire to his father, without mentioning his brother, and shall recouer the land and dammages from the death of the father by the Law, yet the elder brother might haue released aswell the right of the land, as of the profits, which should haue beene a bar to the younger. But in a Writ of Aiel, the Demandant shall recouer dammages only from the death of his father: the reason, for that although the Aiel surui-

ue

nine the father, the Demandant must of necessitie convey by his father, viz. he must make himselfe sonne and heire to his Father, and Cosin and heire to his Grandfather. Notwithstanding the generall ground, that all Chattels goe to the Executors, in some cases Chattels goe to the Heire and not to the Executor: As is of the dammages from the death of the father to the death of the elder brother supra: So if a man sue a Writ of right of ward, of a Ward that he hath by his owne fee, and die hanging the writt, and his heire according to the Statute of West. 2. sueth a Resummons and recouers, here the Heire shall enioy the wardship, which is a Chattel against the Executors, but that is by force of the Statute: So commonly there is no generall ground in the Law so sure, but sometimes failes: and in these cases the Heire is not holden in conscience to pay the Executors any part of the value of these Chattels; for as appeareth in the last Chapter, it is only by the Law of man, that disposition of Chattels is giuen to the Executors, so that where that Law taketh them from Executors, they be rightfully taken from them. But if the younger

*Co. li. 2. f. 93. b.

*Li. 3. Co. f. 12. Sir Thomas de Wyke. 2. Edw. Sir Thomas de Wyke's Case.

younger brother had entred supra, without bringing his Mordancester, as he might, there because there is no Law that taketh the dammages from the Executors, so that the generall ground, that all Chattels goe to the Executors holdeth, there the Abator is bound in conscience to make restitution of the profits supra, to the Executors, so are they supra if the Father overlive the Aiel, in conscience to restore to the Executors of the father, the profits incurred in his time.

Cap. XIII.

BEfore the Statute of Merton, ca. 1. the Demandant in Dower should recouer no dammages, but by the Statute, where the husband dieth seised, the wife shall recouer dammages, which generall words of the Statute haue beene alwayes construed, where the husband dieth seised, and where the Tenant may not say, that hee is, and alwayes hath beene ready to yeeld Dower, that the Demandant shall recouer dammages from the death of the husband, viz. the profits of the third part of the land from that time, and

4. Co. 30. b. 10. Co. 116. a. Fitzh. 32. b.

and dammages for the detaining of them: But if he appeare the first day, and can say, that he was alwayes readie to yeeld dammages, if it had beene demanded, it is a good excuse for dammages, though the husband died seised: The reason, for that he that hath possession of land, whereunto a woman hath title of Dower, hath good authoritie, as against her to take the profits till she require her Dower upon the ground, and the Tenant be not there to assigne it, or being there will not assigne it; for euerie woman that demandeth Dower, affirmeth the possession of the Tenant as against her, and although she recouer by action, she leaueth the reuersion where she found it, though it be in a Villein for, and doth not recontinue the right, as other Tenants for life doe, which is the reason the Tenant shall be received to the plea supra: Contrarie in Cosinage, &c. for there the Tenants be supposed wrong doers: But where the husband alieneth and dieth, there no dammages are to be recouered by the Law, then if the woman demandeth her Dower, and the Feoffee refuseth to assigne it, and after she demandeth it againe, and he assigneth it, it seemeth he

Fitzh. 32. b. 9.
Fitzh. 33. b. t.
Fitzh. 33. a. t.

he is not bound in conſcience to pæid her dammages before the requeſt, Cauſa qua ſupra: But after the requeſt he is in conſcience, though not by the Law; As it is where Tenant for life is diſſeiſed and dieth, and the Diſſeiſor dieth ſeiſed, and his heire entreth, and he in the reuerſion recouereth the land againſt the heire, though by the Law he ſhall recouer no dammages, yet in conſcience the heire is bound to pay dammages to the Demandant, where a ſome hath dower aſſigned in thandury ſhee ſhall haue no dammages. Fo. fol. 33. a. *c

Cap. XIV.

A Diſſeiſor, to extinct the right of the Diſſeiſee, which hee well knowes, leuieth a Fine with Proclamation, and fiue yeares incurre without claime made by the Diſſeiſee, the right of the Diſſeiſee is bound by the Law. But it is doubted, whether being done of purpoſe to extinct the right that hee knew, was better than his owne, it extinct it in conſcience: But if the Diſſeiſee know of the Fine, and wilfully ſuffer the fiue yeares to paſſe, it is the clearer. v. 3 l. 87. b. & 79. b.

Cap.

Cap. XV.

The husband having issue by his wife, Land descends to the wife, and before the husband can by possibilitie come to the land to enter, his wife dieth, the husband shall not by the Law be Tenant by the Curtesie, for a man shall not be Tenant by the Curtesie of land, but of a possession of his wife in Fait, though a woman shall be endowed of the possession of the husband in Law: But the husband shall be Tenant by the Curtesie of a rent, although his wife die before the day of payment: So of an Admowson, although she die before auoidance: And this by an old Custome and Maxime of the Law, that serueth for these and not for the land; for if the reason were, because of the impossibilitie to haue seisin before the day of payment or auoydance, that reason should also hold here in the principall case: Then the Law being vt supra, there is no helpe in Conscience; for Conscience must bee grounded alwayes vpon some Law, and it is not by the Law of God nor of Reason, that

v. Plowd. 9. 91. a. 2 Co. 3. 34. b.

v. Plowd. 90. b. 2 Co. lib. 1. f. 97. b.

that a man shall bee Tenant by the Curtesie, but by the Custome of this Realme. Then seeing the Custome helps him not, hee cannot bee holpen in conscience: So where a reuersion is granted without Attornement, or a new rent without deed, or land, before 32. H. 8. was deuised by will that was not deuisable by Custome, vnlesse the same were vpon consideration of money, &c. So where Tenant by Posteritie makes a Feoffment, and takes backe an estate, so that he now holds by posteriorities, in all these cases seeing there is no title or helpe in Law, there is none in Conscience; for Conscience neuer resisteth the Law of man, nor addeth vnto it, but where it is in it selfe directly against the Law of Reason or the Law of God, and then it is more properly called a corruption than a Law. Or where a generall ground of the Law of man worketh in any particular case against the said Lawes, as it may, it being a good Law. Or where there is no Law of man prouided for him that hath right by those Lawes; And then sometimes remedie is giuen by Subpena, sometimes not, but it is left to the parties conscience.

Cap. XVI.

A Rent charge is granted in Fee out of two acres of land, the Grantor after without consideration infeoffeth the Grantee of one of the acres to the Grantees owne vse, the whole rent is thereby extinct in Law; for the intire rent was going out of both acres, and not part out of one and part out of the other, then when the Grantee purchaseth one acre whereby that is discharged, the other also must be discharged, vnlesse it should be apportioned, and in this case the Law will suffer no apportionment by the parties owne act, for this rent beginneth all by the act of the partie, and is called a rent against common right, wherefore it is not fauoured in Law, as a Rent seruice is, but if part of the land descend, there shall be an apportionment, because hee hath the land there by act of the Law, and no folly can be assigned in the partie. But in conscience it seemeth the whole rent doth remaine supra, if the Feoffment were vpon trust, for no reason that acre whereof he is infeoffed, of which he

Transfer. 147. b. 9.

he is to take no profit, should bee discharged also of the rent, and so for the other acre in the Grantors hand, because hee was in as great fault to make the Feoffment, as the other to take it. Also if the Feoffment were made upon a bargaine, or contract, if in their bargaine they remembred the rent, conscience must follow the bargaine, if not, it is to continue in conscience after the portion, but in the principall case, it is extinct in conscience, as it is in the Law: for grants of profits out of land, have not their effect by the Law of Reason, more than grants of land it selfe, but by the Law of the Realme, if they had, they might aswell passe by word, as by deed; but the grant of a rent, if it be not by deed is void in Law, then may the Law of the Realme determine how long such rents shall continue, and when the Law iudgeth such rents void, so doth Conscience, except the iudgement of the Law be against the Law of God, or the Law of Reason, as it is not in this case: But if he be ignorant that he hath such a rent, which is ignorantia facti, or if he be ignorant that the Law would extinct the whole rent, which is ignorantia juris, although such igno-

rance helpe little in the Law of England, it seemeth the rent doth remaine in conscience after the portion, because in conscience no default can there bee assigned in him.

Cap. XVII.

When granteth a Rent charge out of two acres, and after infeoffeth H. of one of the acres, after H. intending to extinct all the rent, causeth his acre to be recouered against him by a Writ of Entre in the Post, in the name of the Grantee and others to his owne vse, the Grantee not knowing of it, the other Demandants enter by force of the recouerie, and die, so that the Grantee is seised of all the acre by the Surviuor to the vse of H. the whole rent is extinct in Law, for the whole rent cannot be issuing out of the acre in the Grantors hand, this recouerie being vpon a fained title, which the Grantor being a stranger vnto may falsifie: but if the recouerie had beene vpon a true title the whole rent should haue been issuing out of the other acre. (B.) Quære being his owne act, for

Fitzh. 148. b.

Fitzh. 148. b.

3. E. 3.

3. E. 3. where a woman hauing a rent out of three acres, recouered one in Dower, the rent was apportioned. But here the whole rent by the vnitie of possession, although without the ble, is determined against the Grantor: So in conscience the Grantor not being priuie to the cause of the extinguishment, as in the case before, and the Grantee is in conscience to haue the whole rent of H. In this Chapter and the last, where it is said, the rent is extinguished in Law, it is vnderstood, that the remedies at the Common Law by Distresse, Assise, &c. are determined, and the partie that ought to haue the rent in conscience, shall be put to his Subpena.

CAP. XVIII.

A Villeine is granted to a man for life, or yeares, and purchaseth lands in fee, the Lesse entreth, he shall hold the lands to him and his heires: But if a Seigniorie be granted for life, and the Tenant attorne, and die without heire, and the Tenant for life entreth, he hath no other estate there

postea ca. 43. Mich. 11. 17. a. Perkins. fo. 29. b. Perkins. fo. 20. b.

in the land, than he had in the Seignioꝛie, foꝛ in this caſe of Eſcheat, the land commeth in lieu of the Seignioꝛie, and the Seignioꝛie is cleerely extinct, but in the pꝛincipall caſe, he hath not the land in lieu of the Villeine; foꝛ he hath the Villeine as befoꝛe, but he hath the land as a Peꝛquiſite by meanes of the Villeine, which hee ſhall haue in like caſe, as the Villeine had them, viz. of his goods and chatels the whole pꝛopeꝛtie: of his leaſes foꝛ yeares, the whole terme: of an eſtate foꝛ life, the ſame eſtate: and of Fee ſimple and Eſtate taile, the Lord ſhall haue a Fee ſimple, though he had but an eſtate foꝛ yeares in the Villein, ſo that he enteꝛ oꝛ ſeiſe accoꝛding to the Law, befoꝛe the Villeine alien, oꝛ elſe he ſhall haue nothing. And if an Executoꝛ haue a Villeine, that his Teſtatoꝛ had foꝛ terme of yeares, and he purchaſeth lands in fee, and the Executoꝛ entreth, he hath a Fee ſimple in the land, but it is to the behoofe of the Teſtatoꝛ, and ſhall be an Aſſets in his hands. (B.) Like Law of a Biſhop, Paꝛſon, &c. Which haue a Villeine in right of their Church, which purchaſeth land and they enter, they are ſeiſed in right of the Church, and

Inſtit. 117. a. 1 Inſt. a. 21. com. 292. a. *

Inſtit. 117. a.

and not as a Perquiſite. Note the diuerſitie, for a Leſſee, &c. hath the Villeine in his owne right for the time &c. And the Lord may impriſon the bodie of his Villeine if hee will. And admitting the Law, that a man may ſo take away the lands and goods of his Villeine, and impriſon him, to ſtand with conſcience (becauſe it hath beene ſo long admitted in the Lawes of the Realme, and hath beene put in vre both by Spiritualtie and Temporaltie) the Law that determineth what eſtate the Lord ſhall haue vt ſupra by his entrie, is neither againſt the Law of Reaſon, nor the Law of God; and therefore conſcience muſt follow the Law of the Realme therein.

Cap. XIX.

If a man miſtake the Law, as if in the caſe in the laſt chapter, hee giue counſell to him in the reuerſion, after the death of the Villeine, that he may enter, and that the Tenant for life by his entrie had but an eſtate for life of the Villeine, whereupon he entreth, to the great expences of both parties

in ſuits, the Counſellor if he knew the Law, is bound in conſcience to reſtitution to both parties, of that they are indammaged, as alſo to make amends for his vntruth: So if he toke vpon him to know the Law, and had taken no competent ſtudie therein, hee is bound to reſtuution to both parties: But if hee that hath taken ſufficient ſtudie, doe miſtake the Law in ſome hard point, he is not bound to ſuch reſtitution. If he aſke the counſell of one that he knoweth is not learned, the Client, or Counſellor (if the Client be not ſufficient) becauſe he gaue counſell to the wrong, be bound to reſtitution to him againſt whom &c. but the Counſellor in that caſe is bound to nothing as to him that he gaue the counſell vnto; for there was as much default in him to aſke counſell of one whom he knew ignorant, as in the other for his preſumption to giue counſell being ignorant: But if hee that gaue the counſell knew not but that the other had truſt, both that hee could and would giue him good counſell, howbeit the truth was that hee could not ſo doe, then is he bound to offer amends, but the other may not take it in conſcience. An admonition

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to Counsellors, to be warie in giuing aduice, and not to thinke it a rebuke vnto them, to withdraw that they haue misdone, but to follow the saying; That we haue vnaduisedly done, let vs with good aduice reuoke againe. If a man giue counsell in this Realme, as his learning and conscience giueth him, and regardeth not the Lawes of the Realme, he giueth not good counsell. for euerie man is bound to follow the Law of the Countrey where he is, if it be not against the Law of God, nor the Law of Reason, and so may the cases be, that he may binde himselfe to restitution by such counsell.

Cap. XX.

A Man of his meere motion infeoffeth H. by Indenture vpon Condition, that he shall yeerely pay to I. S. out of the land a certaine rent, and if he faile, then it shall be lawfull to the said I. S. to enter, &c. the rent is vnpaid, I. S may not enter by the Law, nor Conscience; for there is an ancient Maxim, that no man shall take aduantage

v. Litt. Sect. 345. & 346.

uantage of a Condition, vnleſſe he be partie or priuie to the Condition: And as to the intent it is void in many caſes to all intents, not being grounded according to the Law: As if a man make a leaſe for life, and after confirmeth the eſtate of the Tenant for life, the remainder ouer to A. B. in fee, it is a void remainder, notwithſtanding the intent; for by the Law, no remainder can depend vpon any eſtate, but that the eſtate begin at the ſame time when the remainder doth, where in this caſe, the confirmation inlarged not his eſtate, nor gaue him any new eſtate: But if the leaſe had bene pur auter vie, and the Leſſor had confirmed the eſtate of the Leſſee, for the life of the Leſſee the remainder ouer, it had bene a good remainder, for there the eſtate is inlarged. (B.) Note although there be no words of grant. And in the firſt caſe, it cannot inure to A. B. by way of grant of a reuerſion, for that he is no partie to the deed; And no grant can be made but to him that is partie to the deed, except by way of remainder: Therefore if a man grant to a ſtranger, that his Leſſee for life ſhall haue eſtate to him and his heires, it is a void grant, if it be of his mere motion.

v. remainder to Lif. 2. E. 3. 23. Fryſh. 317. b. Pl. Com. 25. b. contra vet. tre.

Pl. Com. 25. b. t.

motion. So if a man make a leaſe for life, and after grant the reuerſion for life, the remainder ouer in fee, and the Tenant for life attorneth to the Grantee for life, intending that hee only ſhall haue aduantage by his attornment, his intent is void, and it inureth according to the grant. but the Feoffor may enter ſupra for the condition broken, for the words vpon Condition, imply a re-entrie to the Feoffor, then the words ſubſequent, that the ſtranger ſhould enter, are but nugation and void in Law.

Cap. XXI.

If the words in the laſt caſe had not beene conditionall, but by theſe words; It is agreed, that the Feoffee ſhall pay to H. and his heires the ſaid rent, and if he faile it is agreed that H. and his heires ſhall enter into the land, then for nonpayment neither the Feoffor nor the ſaid H. ſhould neuer enter into the land; for here is no re-entrie giuen to the Feoffor, as in the caſe precedent, and the entrie giuen to H. is void in Law, becauſe he

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is a ſtranger to the deed, therefore here it is to ſee to what Vſe the Feoffment ſhall be taken, and it ſeemeth it ſhall be to the vſe of the Feoffee, as long as hee payeth the rent, for no reaſon he ſhould be troubled with payment of the rent, and haue nothing for his labour, neither can the intent of the Feoffor bee taken ſo, except he expreſſed it, alſo by the words, That if the rent were not paid that H. ſhould enter, it appeares that he meant not to haue any vſe himſelfe: So this varies from the common caſe of vſes, where a man makes a Feoffment, and it appeares not to what vſe, ne it is not vpon any recompence, it ſhall be taken to the vſe of the Feoffor, except the contrarie can be proued by ſome bargaine, &c. or that his intent was expreſſed to ſome other vſe at the time of the liuerie: So the knowledge of the intent of the Feoffor is the greateſt certaintie for knowledge of the vſe in this caſe; but when the Feoffor ſaith, That if the rent be not paid, that then the ſaid H. ſhould enter, though by the Law he cannot enter and haue Freehold, yet the intent of the Feoffor appeares thereby, that he ſhould haue the vſe; for ſeeing hee had the rent to his

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owne vse and not of the Feoffor, it seemeth he shall haue the vse of the land that is assigned to him for non-payment of the rent, and it must be vnderstood that he had the rent to his owne vse, and it shall not be vnderstood to any other vse, vnlesse it can be proued, for it is no rent in Law, and though it were assigned to him and his heires without Condition, he hath no remedie for it by Distresse, Assise, Writ of Annuitie, &c. But his remedie is in Chancerie, where he must suggest that he ought to haue it in conscience, and hath no remedie at the Common Law. And if he haue no remedie but by way of conscience, it seemeth when he hath recouered it, he ought to haue in conscience, and that to his owne vse, vnlesse the contrarie can be proued. and if the intent of the Feoffor were that he should dispose it for him, as he should appoint, then hath he the rent in vse to another vse, which is seldome seene, and shall not be intended till it be proued. And so in Conscience, for Conscience searcheth that which the Law doth, viz. the intent of the Feoffor. See cap. 23. the reason of the diuersitie that in this

Chapter

Chapter the intent of the Feoffor is so much regarded, and not in the last.

CAP. XXII.

VSes of land first began and were reserued by a secondarie conclusion of the Law of Reason thus, when the generall Custome of propertie came in, it followed of reason that a mans lands and goods ought not to be taken from him but by his assent, or by the Law; And then sith hee that hath lands, hath thereby two things, one the Possession, called in our Law the Freehold; the other Auctoritie, thereby to take the profits, he that hath land and maketh a Feoffment, intending to giue only the Freehold, and keepe the profits, ought in reason and conscience to haue the profits, and then the Feoffee is said seised to the vse of the Feoffor. And although a man make a Feoffment, reseruing the profits or any part thereof, as Common, Wood, Grasse, &c. it is a void reseruation in Law, for it is parcell of the thing granted (and is not

Pl Com. 351. a.

Fitzh. lib. 142. a. above G.
Pl Com. 153. a.

not like the case as where a man fea- Perkins. fo. 122. b.
seth his Manor, except iii. acre, for there iii. acre was neuer leased,) yet it doth not prohibit such reseruation, so he that makes such reseruation offendeth no Law thereby, and therefore the reseruation in conscience is good, contrarie if such reseruation or vses were prohibited by Statute, and the Statute were not against reason, but it should preuent the Law of reason, in putting away the consideration whereupon the Law of Reason was grounded before the Statute. And the reason why the vse remained to the Feoffee, notwithstanding his owne Feoffment, Fine, and also Recouerie sometimes, is the cause and intent of the gift. A motion that it is inconuenient that matters of Record should so lightly be auoided by a secret intent and vse of the parties, and by a nude and bare auerment and matter in fait. The causes why there haue so many persons beene put in estate of lands to the vse of others are many: Some are put away by diuers Statutes, and some remaine: Some haue put their land secretly in Feoffment, to the intent that hee that hath right should not know against whom

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to bring his action, which is some-what remedied by Statutes that giue actions against Pernors. Sometimes to haue bearing of their Proffers; To put away such maintenance, treble dammages is giuen by Statute against such Proffors. Sometimes to the vse of Mortmaine, when they could not giue the Freehold, which is taken away by the Statute of R. 2. Sometime to defraud the Lords of Wards, Reliefes, Heriots, Lands of their Villeines, which are put away by Statutes made tempore H. 7. Sometime to auoid Executions vpon Statutes and Recognisances, remedied by Statute 19. H. 7. And they yet remaine for diuers causes: As to put away Tenancie by the Curtesie, and titles of Dower: And because, if they were out of the hands of the Conusor, at the time of the Execution sued, they shall not be had in Execution vpon Statute or Recognisance, nor vpon an Extend' facias ad valentiam: And Cestuy que vse may declare his will thereon: Sometimes for surety of couenants in Indentures of mariage and other bargaines, which two last are the principall causes why so much land is put in vse. Also a vse

v. Brathed' lib. 3. Co. 77.

is

is no Assets in a Formdon, nor in an Action of debt against the heire, neither shall be taken in execution vpon an Elegit. A vse may be limited to a stranger vpon a Feoffment, as also to the Feoffee himselfe, without consideration: And Cestuy que vse without consideration may grant, that thencefoorth the Feoffee shall be seised to his owne vse; for a vse in esse may as well be granted without consideration as the land might: But a man cannot commence an vse but by liuerie, or vpon a consideration, or bargaine: for if a man seised of Land grant without consideration, that thencefoorth he will stand seised to the vse of the Grantee, it is void. Pl. Com. 310.

Cap. XXIII.

The Diuersitie betweene the two cases in the xx. and xxi. Chapters is this: In the first case the Feoffor might enter for nonpayment of the rent, then by his entrie he auoided the first Liuerie, and was seised of like estate as before the Feoffment; so here remained nothing whereupon the

ſtranger might ground his vſe, but only the bare grant or intent of the Feoffor, and a nude grant of him that is ſeiſed of lands is not ſufficient to begin an Vſe vpon, although an Vſe in eſſe may be granted away without recompence, as the land might, if it had beene in poſſeſſion: but it is a ground that an Vſe cannot be begun but by a liuerie, or vpon a recompence or bargaine, and that there is ſuch a ground appeareth thus: If a man make a deed of Feoffment, and deliuer it as his Deed, the Feoffee hath no title before Liuerie, but only may enter and occupie at the will of the Feoffor, and there is no booke that the Feoffor is in this caſe ſeiſed to the vſe of the Feoffee. So if a man make a Deed of Feoffment of two acres lying in ſeuerall Shires and liuerie in one, &c. yet it appeareth by the words of the Deed, that the Feoffor gaue the lands to the Feoffee, but yet for lacke of liuerie the gift was void, ſo is it here vnleſſe liuerie be made accordingly. But in the ſecond caſe the Feoffor may not re-enter, ſo the liuerie is on foot, and therupon the firſt vſe may well begin in the ſtranger, when the rent is not paid vnto him according to the firſt agreement.

agreement. The Law of reason that a man may doe nothing against the troth is not broken, if such a nude grant to stand seised, &c. vt supra bee holden void: for it is not against the Grantors troth, though he be not seised to the Grantees vse, but it proueth that hee hath granted that the Law will not warrant, and therefore the grant is void. But if the Grantor had gone farther, that he would suffer the Grantee to take the profits, or that he would execute estate vnto him when he should be required, there he were bound in conscience by the said rule of the Law of Reason, though by the Law it is, Nudum pactum ex quo non oritur Actio.

Cap. XXIV.

COntracts are grounded on the Custome of the Realme, and by Ius Gentium, and not directly by the Law of Reason; for vntill propertie was brought in there were no Contracts: but then they were necessarie, that a man might lawfully haue of his neighbour that he had not of his

owne. Contracts therefore are made by assent of the parties by agreement betweene them of goods and lands for money or other recompence, but of money vsuall, for money vsuall is no Contract. A Concord is properly an agreement betweene the parties with diuers articles arising on the one side and on the other: As if A. let a chamber to B. and it is farther agreed betweene them, that B. shall board with A. and B. to pay for his chamber and board x. li. this is properly a Concord, but it is also a Contract, and an Action lyeth vpon it: But the diuersitie betweene a Contract, Concord, Promise, Gift, Lone, Pledge, Bargaine, Couenant, &c. is not much argued in our Lawes, the intent whereof is to haue the matter, and not the termes argued. A Nude Contract, is where a man bargaineth his goods or lands without recompence appointed; As if I say, I sell thee all my lands or goods, and nothing is assigned to bee giuen for it, and this is void in Law and Conscience. A Nude Promise is, where I promise one such a summe, or to build him an house, or to doe him such seruice, and nothing is assigned for it, no action lieth though they bee

not

not perfozmed. So if I pzomise to keepe anothers goods safe till such a time, and after I refuse to receiue them: But if I receiue them, and they be lost oz impaired by my negligent keeping, an Action lieth. If a man haue a charge by reason of a pzomise made vnto him, and hath perfozmed the charge, he may haue an Action foz the thing pzomised; As if one say vnto him, heale such a powze man, oz make that high way, and I will giue thee x. li. if he doe it, an Action lieth. So where the thing is spirituall, as marrie my daughter, and I will giue thee x. li. and he doth it, an Action lieth, foz he hath Quid pro quo, viz. the pzeferment of his daughter foz the money. But if they to whom, &c. haue no charge by reason of the pzomise, as if one pzomise money to an Vniuersitie, Citie, Church, Clergie powze men &c. though it be foz the Common-wealth, oz seruice of God, there no action lieth. But if he intended to be bound, so it be honest, lawfull, and possible, and if he doth it not, he is a lier, which is pzohibited both by the Law of God and of Reason, but because his intent is secret in his heart, the Law of man cannot iudge of it, if he intended not,

9. E. 5. C. f. 14. a.
x. ca. 38. E. 4. 9. C. fo. 83. b. C. 84. a.

he offended only for his dissimulation, yet by meane accidents he may be discharged. If I promise one xx. li. because he hath built me an house, or lent me such a summe, &c. although no Action lie by the Law, because it is upon a consideration executed, yet there I am bound in conscience to performe it after mine intent, as aforesaid. If I promise one x. li. in recompence of such a trespasse, no Action lieth, the reason for that promises be no perfect Contracts. For a Contract is properly where a man for his money shall haue by assent of the other partie, goods or other profit at the time of the Contract or after: but if it be promised for a cause past by way of recompence, it is rather an Record, which must be executed in hand; for upon an Record lieth no Action, and here he may be his owne Judge in conscience; for though a man ought to performe in conscience such promise as he was in conscience bound to before the promise, though hee intended not to bee bound by his promise, as if he promise his father a gowne to keepe him from cold, &c. and here he was bound to make satisfaction for the trespasse before, yet because trespasse is uncertaine,

*Sl. Com. 5. a

taine, and the partie is still at libertie to haue his Action, he is not bound, otherwise is it if it were of a debt. In the cases supra of promise for a Common-wealth or seruice of God, it is said an Action lieth in the Canon Law, but in this Realme if the promise be of a temporall thing, if an Action bee brought thereof in the Spirituall Court, a Prohibition or Premunire lieth, though no Action vt supra lie thereof in the Kings Court; So if debt be brought against Executors there vpon a simple Contract, or for periurie in a wager of Law, though no remedie lie for the periurie in the Kings Court; for a Prohibition lieth where the Spirituall Court holdeth plee in case where by the Kings Prerogatiue and Custome they ought not, and not only where the partie may haue his remedie in the Kings Court.

Cap. XXV.

A Man hauing two sonnes, one before, the other after espousals, deuiseth to his sonne and heire all his

goods, where in the Spirituall Law, he that is borne before espousals is Mutter, in our Law he is Bastard, and for a legacie of goods the suit must be in the Spirituall Court, but if it had been of Chattels reals, as of a lease for yeares, or a Ward, &c. it should have been in the Kings Court, the question which shall be taken for heire supra, and it is holden that the diuersitie of the Courts shall not make any diuersitie of Judgement, for then might follow this inconuenience, that if the bequest had been both of Chattels reals and personals, one should be iudged heire in one Court, and the other in the other, which cannot be intended the fathers meaning; therefore he shall be iudged as heire, which is heire by the Common Law, viz. he borne after espousals, and the Iudges Spirituall are here bound in conscience to take notice of the Common Law. as in the case supra fol. 5. Where two Joynt-tenants be of goods, and one deuiseth his part, and the partie sueth for his legacie in the Spirituall Court. In this where Executors of a man outlawed, are sued for performing of a Legacie, and plead the Outlawrie in the Spirituall Court in discharge,

antea. Co. Mountg. 1. ca. 6.

antea. Co. Littl. 1. ca. 6.

discharge, because they be chargeable to the King, and yet there is no such Law of Outlawrie in the Spirituall Law. So must the Kings Judges doe when matter commeth before them that ought to be iudged after the Spirituall Law. ¶ If a Parson alien a portion of Dismes according as the Spirituall Law hath ordained without solemnities of the temporall Law, if it be under ꝑ value of the iiij. part of the Church, Quære whether it be good, but if it be to the value of the iiij. part or aboue, it is not good, therefore was the Writ of Right of Dismes ordained. And if in a Writ of Right of Dismes, it be adiudged in the Kings Court for the Patron of the Successor of him that alieneth for want of the solemnities of the Common Law, the Iudges spirituall are bound to giue their iudgement according to the Iudgement giuen in the Kings Court. Likewise if a Parson agree to take a pension for the tithe of a mill, if the pension be to the iiij. part of the value of the Church or aboue, it must be aliened after the solemnities of the Kings Lawes, as Lands and Tenements must, else a Writ of right of Dismes lieth, &c. And although

the

10 Co. 136. b. the Statute of Weſt. 2. cap. 25. which giueth the Patron a Writ of right of Diſmes, where the Incumbent had good right by the Spirituall Law, and was let by an Indicauit, where at the Common Law it lay only where the Incumbent had no remedie by the Spirituall Law, although this Statute ſpeake only of Diſmes, yet for that it lay of offerings and penſions in caſe where it lay at the Common Law, aſwell as of Diſmes, it is taken, that by the equitie of the Statute, it now ſo lieth alſo; (And ſome ſay, it lay of leſſe than the iiij. part at the Common Law, vide Fitzh. Nat. Br. fol. 30. E.) The reaſon why a Writ of right of Diſmes in the caſe ſupra, lay at the Common Law for the Patron, was for that by the Spirituall Law, the alienation of the Parſon with the aſſent of Biſhop and Chapter, barres the Succeſſor without the aſſent of the Patron; wherefore the Patron had his remedie at the Common Law, where ſuch alienation without his aſſent is not good. Farther, where the Spirituall Court may hold plee of a temporall thing, they muſt iudge after the temporall Law: But if it were in queſtion, whether the

2 Na. Br. 30. c.

10 Co. 136. b. Na. Br. 30. c.

the eldeſt ſon ſupra may be a Prieſt, becauſe in the tempozall Law he is a Baſtard, that ſhould be iudged after the Spirituall Law; for the matter is Spirituall, but the goods ſupra tempozall.

Cap XXVI.

AN Abbot by our Law had the whole diſpoſition of the lands and goods of the Abbey, without the Couent; for they were dead perſons in Law, and the Abbot ſole ſhould ſue and be ſued, doe homage, fealtie, attozne, make leaſes, and preſent to Aduowſons, in his owne name, without the Couent. And the Decretall, that an Abbot might not preſent without the Couent, held not in this Realme, becauſe the makers did exceed their auchozitie, to take the ſaid power from him here, therefoze neither was it to be holden in conſcience. Againſt the vſurped auchozitie of the Pope, vnder the colour of Vicar generall, to preſent to all Benefices with cure, our Law was alwayes, that the Patron might preſent in his owne right:

right: But the Patron must present him to the Bishop, who must examine his ability: If he finde him not able to take cure of soules, he is to refuse him, and the Patron to present an able person, who must be admitted, instituted, and induced by the Bishop: and this claime stands with reason and conscience. The deprivation from a Benefice belongeth to the spirituall Jurisdiction: but the right of presentment to a Church is a temporall inheritance, and shall descend as Lands and Tenements shall. And is an Assets. And for the triall of the right of Patronages, there are Actions in our Law, viz. Droit d'advowson, Assise de darrein presentment, Quare impedit, &c. and they haue bene alwaies pleadable in the Kings Courts, which is to be obserued in conscience. Able, or vient able, shall be tried by the Ordinarie, vnlesse he be partie, and then by the Metropolitan. If an Abbot in his presentment had named the Conent, it was but Surplusage, and made not the presentment void, and if he were disturbed, he might bring his Action in his owne name.

Cap.

Cap. XXVII.

If a man finde beasts in his ground Dammage feasant, he may take them as a Distresse, and put them in Pound ouert, (so it be within the Shire) there to remaine till the owner make amends for the hurt. A Pound ouert is not only a common Pound, but euerie place where the owner of the Distresse may come lawfully, not being a Trespasser, and giue them meat: If in such a Pound ouert they die for lacke of meat, it is at the perill of the owner, so that he that distraineth them is at his liberte to take his Action for the Trespasse: But if it bee not a Pound ouert, or that they be driuen out of the Shire, and die, there it is at the perill of him that distraineth. The owner of the Cattell, after hee hath tendred amends, may not take his Cattell out of the Pound, for he may not be his owne Judge, if he doe, a Parco fracto lieth against him: But his way is to sue a Replevin to haue them out, and thereupon the sufficiencie of the amends offered is issuable, if it were not sufficient, the Auowant

Fitzh. N.B. 47. b. t.

Bro. Com. 68. a.

Sanders 26. 1 Ca. 5.

5. E. 2. Co. 76. a.

Anowant shall haue such amends as the Iurie shall assesse, if it were sufficient, he shall yeld Dammages in the Replevin, because the issue is tried against him: If after sufficient amends offered, they die in such Pound ouert, yet is it at the perill of the owner, for he is bound at his perill, by reason of the wrong done at the beginning, to see that they haue meat so long as they shall bein Pound, vnlesse the Kings Writ come to deliuer them, and if hee that distrained refuseth that, then if they die for lacke of meat, it is at the perill of him that distrained, and the owner shall recouer dammages against him in an Action vpon the Statute, for disobeying the Kings writ.

*8.6.146.6 & Na. B. 69.7.

Cap. XXVIII.

By the Ciuill Law, a man before the age of xxv. yeares cannot giue, vnlesse it be with authority of his Tutor: But in our Law, the age to giue or sell lands and goods is xxj. yeares, which must be obserued also in conscience: But before that age it is

Fuster. 78.6.

is not good (by whose assent soeuer it be) except for his meat and drinke, and necessarie apparell, or as Executor in performance of the will of his Testator, &c. If a decree were made by the Church, that if one bequeath goods, to be deliuered to the partie at his full age, that in that case xxv. yeares shall be taken for his full age, this Decree bindeth not; for though the Probate and execution of Testaments, made of goods and chattels belong to the Church, except in certaine Lordships that haue the Probate by Prescription, yet it belongeth to the King and his Lawes, to determine what shall be the lawfull age of the partie to haue the goods, and the spirituall Iudges ought to iudge the full age after the Law of the Realme, seeing the matter of the age concerneth temporall goods: And the King by authoritie of Parliament might ordaine, that all Wills should be void, à fortiore he may appoint at what age Wills shall be performed: And he might take away the power of the Ordinarie to call Executors to accompt, which proues, that the Common Law may ordaine the time of the full age, aswell in wills of temporall things, as otherwise, and also

Infra f. 172. a. t.
v. Perkins fo. 4. a
v. Perkins fo. 4. a &
5. Co. 27. b.

vide Cooke 5. f. 73.
v. Perkins fo. 94. a.
9. Co. 37. b.

also that wils shall be made, à fortiore it belongeth to the Kings Law to interpret wils concerning temporall things, aswell when they come in argument before spirituall Judges, as before temporall, and that they ought not to be iudged by seuerall Lawes.

Cap. XXIX.

By the Ciuill Law, an Heretick cannot make Executors, for his goods be forfeited: But in our Law, if a man were conuict of Heresie, and abiured, he forfeited no goods: But if he were conuict, and deliuered to Lay hands, he forfeited all his goods that he had at the time of deliuerie to them, but not his lands, except he were executed, and then they were forfeited as in case of Felonie, to the Lords of the Fee, except they were holden of the Ordinarie, for then the King shall haue the forfeiture by a Statute of 2. H. 4. See the Statutes 5. R. 2. ca. 5. 2. H. 4. cap. 15. 3. H. 5. cap. 7. 25. H. 8. cap. 14. 31. H. 8. cap. 14. 34. H. 8. ca. 2. 35. H. 8. cap. 5. 1. and 2. P. & M. cap. 6. and 1. E. 6. cap. 12. 1. Eliz. cap. 1. If the

the Church should decree, that for Heresie the partie shall forfeit his goods, it bindeth not in Law nor Conscience; for though it belong to the Church to determine Heresies, yet goods be temporall, and belong to the Judgement of the Kings Court, and vntill the Statute of H.4 the Ordinarie might set no fine vpon an Heretike, and by that Statute he might, and the King should haue the fine, as by the Statute appeareth.

Cap. XXX.

If Joyntenants or tenants in common of a Patronage varie in their Presentation, the Ordinarie is not bound to admit the Clerke of the more part, nor lesse, but if the six moneths passe before they agree, he may present by Laps: But if he present within the six moneths, they may agree and bring a Quare impedit against him, and remoue his Clerke, and so the Ordinarie shall be a Disturber. But if a Patronage descend to Coparceners, the Ordinarie is bound to receiue the Clerke of the eldest; for the eldest

3 Eliz. 130. b. 4.

3 Ed. 22. b. Inst. 165. b. Na. Br. 33. m.

shall haue that presentment, and the second next, and so forth, which is called a presentment by turne, which holdeth alway betweene Coparceners, vnlesse they make some speciall composition to present otherwise. But if the K. after the death of their common Ancestor, haue the youngest in ward, then the King by his prerogatiue shall haue the first presentment, and the eldest sister the next, and so by turne: And if the eldest sister present with another sister, and the other sisters then varie in presentment, euerie one in their owne name, or together, the Ordinarie is bound hereto receiue neither, but may suffer the Church to run in Laps, and in this case the Church is not properly said litigious, so that the Ordinarie shall be bound at his perill, to direct a Writ to inquire De iure patronatus, for that lieth where two present by seuerall titles. And these manner of presentments are also to be obserued in this Realme in conscience.

Xa. Br. 33. Lyttl.

Fr. fol. 180. b.

Fr. fol. 243. a.

Cap.

Cap. XXXI.

In the Civill Law, the Patron if he be a Lay man hath but foure moneths to present, but in our Law, whether he be Lay or a Clerke, he hath six moneths, which six moneths are to be reckoned after the manner of the auoidance, for if the auoidance be by death, creation, or cession, the six moneths begin presently without other notice, than that the Patron must take at his perill: But if it be by resignation or deprriuation, the six moneths begin not till notice giuen to the Patron by the Bishop himselfe; for it is not sufficient, though the Patron haue notice by a stranger (B. or by another Bishop:) An vnion is also a cause of auoidance, but for that an vnion cannot be made without knowledge of the Patrons, who are to present iointly, or by turne, as the agreement is vpon the vnion, therefore sith the Patron is prime to the auoidance, the six moneths there shall be accompted from the agreement. So note, that ignorance sometimes excuseth in the Law, as in those cases supra, where it excuseth

excuſeth the Patron. He ſheweth that it is conuenient that all men within the Realme, both ſpirituall and temporall, be ordered by one Law as to temporall things, and defendeth the the Statutes of Mortmaine, and the Common Law which determineth of gifts and bequeſts to the Church, not leauing it to the Law Canon, as Doctors would haue it.

Cap. XXXII.

Diuerſities of the Ciuill Law, where one excommenged may be abſoiled without ſatisfaction, &c. In our Law if one be excommenged for debt, treſpaſſe, &c. (which belongeth to the kings Crowne and Dignitie) it is not only an offence to the partie to be called to anſwer in the Spirituall Court, in matters belonging to the Lawes of the Realme (whereupon he may haue a Premunire againſt the Plaintiffe and the Iudge) but alſo againſt the King, who by reaſon of ſuch ſuits, may loſe great aduantages by writs originals and iudicials, fines, amerciaments, &c. therefore there hath ought

ought to be assoiled without satisfa-
ction. So where by diuers Statutes, 26 H. 6. cap. 7. 44 a.
if a man lay violent hands vpon a
Clerke, and beat him, for the orating
amends shall be made in the Kings
Courts, and for the laying of violent
hands, in Court Christian; If the
Iudge in Court Christian award
dammages for the beating, he doth
against the Statute, &c. But if one
be excommenged for a thing, where
the Spirituall Court may award the
partie to make satisfaction, as for not
inclosing the Churchyard, or not ap-
parelling the Church conueniently,
the partie must make restitution, or lay
a sufficient caution, if he be able, ere he
be assoiled: But if he offer amends,
and haue his absolution, and the
Iudge will not make him letters of
absolution, if the excommengement
be of record in the Kings Court, the
King may write to the Iudge, him
commanding thereto vpon paine of
a contempt: If it be not of record,
there the partie may haue his action
against the Iudge: But if he be not
assoiled, or not able to make satisfac-
on, and therefore the Iudge will not
assoile him, it seemeth the partie may
aswell haue his action in that case, for

not assoiling him, as where he is assoiled, and the Iudge will not make him letters of absolution, Quære. Like Law where the partie is accursed for a thing that the Iudge had no power to accurse him in, as in the cases of debt, trespasse, &c. and though the partie may haue a Premunire there, yet the Iudge and partie may die: also though they be condemned in Premunire, that auoideth not the excommengement, therefore the action lieth, and specially where the partie is delayed thereby of actions in the Kings Court.

Cap. XXXIII.

IN the Ciuill Law, there are diuers opinions whether a Prelate may refuse a legacie. In our Law, a Prelate or Soueraigne that may sue and be sued in his owne name only, as Abbots, Priors, &c. may refuse a legacie made to the houses, for a legacie is not perfect till he to whom it is made, assent to take it, otherwise in some case he might haue great losse: But if he will refuse, he must as soone as his title

falleth

falleth relinquish to take the profits, otherwise he shall not refuse the legacie after, and yet if his successor refuse the profits, he may saue the house from dammages, and from arrerages of rents. Like Law of a remainder as of a legacie: For though it be generally holden, that in case of deuise & remainder, the Freehold is cast vpon the partie by the Law when they fall, yet may the partie refuse to take them, as he may doe a gift of lands or goods: For if a gift be made to a man that refuseth to take it, the gift is void. If it be made to one absent, it taketh not effect in him till he assent. No more if a Disseisin be done to the vse of another, he to whose vse, hath nothing, neither is a Disseisor till agreement. But a Bishop sole may not disagree to a deuise or remainder made to him & the Deane and Chapter, nor the Deane sole, if it be made to a Deane and Chapter, nor a Master of a College, if it be made to him and his brethren, for of such lands they cannot answer sole; And they cannot disclaime sole in the lands which they haue by such deuise or remainder: Therefore if a Bishop be vouched, and the lien is alleaged by the Tenant, by reason of a

v. Perkins fo. 10. b. Fitzh. 10. a. Pl. Com. 31. b.

leaſe made to him by the Biſhop, Deane and Chapter, rendring a rent, the Biſhop cannot diſclaime in the reuerſion, without aſſent of the Deane & Chapter. But a Deane ſole may refuſe a grant of lands or goods, or of a reuerſion, made to the Deane and Chapter; The reaſon, becauſe a demiſe and remainder are caſt vpon the parties without aſſent, whereunto the Deane nor the Chapter ſole may diſagree without aſſent of other, but a gift or grant is not good vnto them, vntill they both agree. To ſuch gifts an Infant may diſagree aſwell as one of full age. But if a woman couert diſagree, if the husband agree, the gift is good: but if the land bee charged with dammages or more rent than it is worth, the wife ſhall be diſchargedthereof, if after her husbands death ſhe refuſe the occupation of the land: Iſ it is where a leaſe for yeares is made to the husband and wife, paying a greater rent than the land is worth: And ſo of a ſucceſſor of an Abbot: But if the husband in the laſt caſe ouerliue the wife and die, his Executors if they haue Aſſets to pay the rent to the end of the terme, they may not refuſe the leaſe, but if they haue

haue not Assets, they may waine the occupation, and by speciall pleading discharge themselues of the rents and leases, otherwise they may charge themselues of their owne goods: A lease for life, remainder to an Abbot for life of A. reseruing more rent then the land is worth, Tenant for life dieth, the Abbot may refuse the remainder, Causa qua supra; And though hee assent, if after hee die, or be deposed liuing A. his Successor may discharge himselfe by refusing the occupation. And if such a remainder be made to a Deane and Chapter, and the Deane agree without assent of the Chapter, the Deane and Chapter may after disagree; for the act of the the Deane without the Chapter, shall not charge the Chapter in that behalfe. Lit. Sect. 691.

If in a Præcipe there be but one Tenant, whether hee bee spirituall or temporall, if he disclaime in case where disclaimer lieth, the land shall vest in the Demandant; but if there be two Tenants, it shall vest in his fellow, if he will take the whole Tenancie vpon him, if hee will not, then in the Demandant. But if an Abbot or Lay man refuse the taking the profits, and shew a speciall cause why it

it should hurt him if he did assent, and be thereby discharged vt supra, Quære in whom the lands shall vest. In these cases supra, Conscience followeth the Law.

Cap. XXXIV.

By the Ciuill Law, a gift made vnder a forme shall not be auoided, if the Soueraigne only breake the condition; for the Deed of the Prelate only ought not to hurt the house. But if in our Law a man infeoffe an Abbot by Indenture, vpon Condition of payment of a certaine summe, &c. if the Abbot faile in payment, the Feoffor may re enter, for the Abbot hath no right, but by the gift of the Feoffor, which was conditionall, and that being broken, the Feoffor may re-enter, by which re-entrie he ouerthroweth the first liuerie, and all meane Acts, and holdeth the land as in his first estate, and our Law regardeth not in whom the default be that the condition is broken, except the Feoffor himselfe be Particeps criminis. But there is a great diuersitie, where the gift is absolute,

absolute, for there the Abbot alone shall not by the Common Law disherit his house, except in few cases, but vpon diuers Statutes the sufferance of the Abbot only might disherit the house, viz. by his ceasser, by leuying a crosse vpon an house, and by some vpon his Disclaimer in an Auowrie, a writ of Right of Disclaimer lieth, but where a gift is made vpon condition it neither standeth with Law nor Conscience, that the Abbot should haue a more sure estate than was giuen him. But if the land had beene giuen to the Abbot and Couent, to the intent to finde a lamp, or to giue certaine almes, reseruing no re-entrie, and the wordsimply no re-entrie, the Feoffor nor his Heires haue no remedie, vnlesse it be in case of the Statute of West. 2. which giueth the Cessauit de cantaria.

Perkins. f. 76. a. Fitzh. 92. b. 6.

Fitzh. 204. a. *

Pl. Com. 58. b. Na. Br. 209. l.

CAP. XXXV.

BY the Canon Law, if a gift of land be made to the Church vpon condition, that it shall not be aliened, although the better opinion be that it may

may not be sold for redemption of them that be in captiuitie vnder Infidels, yet it is held, that it may be alened for the greater aduantage of the house, for it cannot be vnderstood but the intent of the giuer was so; And they call the condition, Condito turpis. But by our Law (as this case must bee iudged after the Law of the Realme, and no other Law) if the condition be good, it restraines alienations for the causes abouesaid, aswell as for any other. And although it be a ground in the Law, that if a Feoffment bee made to a common person vpon condition, that the Feoffee shall alien to no man, that the condition is void, because it is repugnant to the puritie of the estate of Fee simple; And an Abbot, that hath lands to him and his successors, hath as perfect an estate in Fee simple, as a common person hath to him & his heires, yet there is this diuersitie concerning their alienations, for when lands be giuen to an Abbot and his Successor, the intent of the Law, and also of the giuer (as is to be presumed) is that it should remaine to the house for euer, and therefore it is called a Mortmain, viz. a dead hand, which letteth not a thing goe whereon it

Fo. Fitz. 224. a.

it hath taken hold, and therefore the Law will suffer the condition to bee good there, though it prohibit the same vpon a Feoffment made to a man and his heires. And such a condition is good vpon a gift in taile, because the Statute prohibiteth, that no alienation be made thereof: Then the condition supra being good, it must be taken generally as the words be generall. and it shall not be taken in Law, that the intent of the giuer was otherwise then is expressed in his gift: (So in conscience) If the condition had beene speciall, that it should not be alienedto A. Then is it to bee taken according to the words, and may be alienedto any other, and if they be alienedto one not excepted, he may alien to him which is excepted, for Conditions in defeasance of an estate be taken strictly in the Law, and without equitie.

Cap. XXXVI.

Diuersities of the Ciuill Law, who shall present if the Patron present not within six monethes, which

hold

hold not in our Law. If in our Law the Patron present not within six moneths of the auoidance, or of notice, v. Ca. 31. & Co lib 6. 29. b. where notice is necessarie, the Bishop shall present by Laps (vnlesse the King be Patron.) If the Bishop present not within his six moneths, the Metropolitan hath other six moneths, and if he faile within his time limited Pl. Com. 498. b. by the Law, the King shall after present by his prerogatiue, for the King is Patron Paramount of all Benefices within this Realme. Although the time be deuolute to the Ordinarie or Metropolitan, yet hath the Patron libertie to present at anytime before they haue collated, and the Bishop or Metropolitan are bound to admit his Clerke. Ka. Br. 31. F. (B. Hereupon it followeth, that so long as the Church is void, the Patron that is disturbed shall haue his Q. impedit: for Plenartie is no plea, vnlesse it be by six moneths before the writ purchased, v. 6. b. 6. 50. b. for him that pretendeth to be interessed as Patron: But where the Bishop or Metropolitan haue presented by Laps, there Plenartie, though it bee but by a day before the presentation of the Patron, is a good plea.) But if the presentation be fallen to the King,

Nullum

Nullum tempus occurrit Regi. Where a preſentment is deuolute to the Metropolitan, himſelfe ſhall put in the Clerke, and not the Ordinarie: So that there lieth no remedie for the Patron againſt the Ordinarie, if hee receiue not his Clerke. In a Writ of Right of Aduowſon, the Tenant ſhall be ſummoned by the Church, becauſe there the Aduowſon is in demand: Otherwiſe it is in a Q. impedit, for there the preſentment is only in debate, ſo that there he cannot be ſummoned by the Church, more than if it were in a Writ of Annuitie, where the common returne is, Clericus eſt & beneficiatus, non habens Laicum feodum vbi poteſt ſummoneri. Neither may he be attached or diſtrained there. The right of preſentments is a temporall thing, and it belongeth to the Kings Lawes to determine, who ought to preſent, and within what time: So of auoidances, as by the Parſons being created a Biſhop, or acceptance of another Benefice without diſpenſation, reſignation, or depriuation. But the examination of the abilitie of a Clerke belongeth to the Spirituall Juriſdiction, viz. to the Ordinarie. And theſe claimes ſtand well with

Law

Law of God. The King may deser the presentment to a Benefice that is deuolute vnto him by Laps. as hee may to one that is of his owne Patronage, Quia nullum tempus, &c. But then the Ordinarie may place one to serue the Cure. as he may when other Patrons are slacke in their presentments.

Stanf. prær. 33. b.

Cap. XXXVII.

BY the Ciuill Law, the collation to all Benefices and Dignities holding in the Court of Rome, or within two daies iourney thereof in comming or going thither, and of the seruants of the Pope, belong to the Pope, &c. But in our Law, the King and other Patrons haue the Presentments, as appeareth in the 26. Chapter. And the plea of the right of Presentments belonged to the King & his Crowne, and the said Law to the contrarie bound not here. Moreouer, the Statute of 25. E. 3. against prouisions and reseruations of spirituall dignities by the Pope, being a generall Statute, was vnderstood also of Benefices

ſices voiding within the Court of Rome: And the ſaid Statute ſtood with conſcience.

Cap. XXXVIII.

By the Ciuill Law, if a man borrow an horſe, and an houſe fall vpon him, if it were likely to fall, hee that borrowed him ſhal beare the loſſe; but if not, but it be by ſudden tempeſt or other caſualtie, it is taken as a chance, and the borrower diſcharged: So by the Common Law, if goods be vſed reaſonably in ſuch manner as they were borrowed for, or as it was agreed at the time of the loane, that they ſhould be occupied: but if they periſh in default of the borrower, or be vſed otherwiſe than they were borrowed for, in what wiſe ſoeuer they periſh, ſo it be not in default of the owner, it is at the peril of the borrower in Law and Conſcience; but if there were no default in him, the owner is to beare the loſſe. Like Law where he hath goods to keepe, whether for a recompence or without; but by ſperial promiſe to re-deliuer them ſafe,

v. ca. 24. & 5. Co. fo. 14. a. & 4. Co. fo. 33. b. & 84. a.

if he haue a recompence for the kee-ping, he may charge himselfe with all chances: But if he had no consider-ation, it is Nudum pactum, and hee is not so bound. If a man haue another mans goods by Trouer, if he suffer them to perish, or lose them by negli-gence, he is chargeable to the owner: Contrarie, if they be lost by casualtie, as if the house where they lay be bur-ned, or that a partie to whom he deli-uered them ouer to keepe, run away with them: And these diuersities hold in pledges: And where one hireth goods vntill a certaine day, &c. By the premisses it may appeare, that if a common Carrier goe by Wayes dan-gerous for robbing, or driue by night and be robbed, or if he ouercharge an horse, whereby he falleth in the water and spoileth the goods, that hee is chargeable for his misdemeanor; If he would not carrie them, but that promise were made, that he should not be charged for his misdemeanor, the promise were void, for against reason, and so it is in all other like cases. The premisses is to be vnderstood of goods borrowed, which may be re-deliuered againe: But if goods borrowed, which cannot be deliuered againe, if they

v. Co. lib. 4. fo. 84. a
Fitzh. 89. a

v. Co. 4. fo. 84. a

they be occupied, perish, as corne, wine, money, &c. (which the borrower may vse as his owne, by force of the words, and must deliuer backe things of like nature and value for them,) it is at the perill of the borrower.

Cap. XXXIX.

By the Ciuill Law, a Clerke cannot giue or bequeath the goods which he hath, by reason of his Church; but such only as he hath, by reason of his person: By the Law of the Realme, a Bishop of goods which he hath with the Deane and Chapter, may make no gift or bequest, but he may of such as he hath of his owne, by reason of his Church, or of the gift of his Ancestor, &c. Like diuersitie of a Deane and Chapter, Master and Brethren except the goods be specially ordered by the foundation. An Abbot might make a gift of the goods of his Church. A Parson, Vicar, Chauntrie Priest, &c. of goods which they haue by reason of their dignitie, as by reason of their person, may make gifts and bequests, for goods of spirituall

men are temporall in what manner soeuer they come to them, and must be ordered by the temporall Law, &c.

Cap. XL.

By the Ciuill Law, if a Clerke die intestate, in goods gotten by the Church, the Church shall succeed him: But of such as he hath by reason of his person, his kinsmen, &c. In our Law, if a Parson, Vicar, or Canon secular die intestate, whether the goods be gotten by reason of the Church, or of his person, the Ordinarie may administer: So of such goods of a Bishop, Master of a College, Deane, &c. as in the aboue said case they may giue and bequeath, and must commit the administration to the next of kin that will desire it, as of a Layman: If no man desire the administration, the Ordinarie may administer, and see the debts paid after such order as is limited by the Common Law; for if he administer otherwise, he is chargeable of his owne goods, if there be not Assets, &c. for though it be suffered, that the Ordinarie may

pay

pay pound and pound like, viz. appoz-tion the goods amongst the Creditozs after his discretion, yet by the Law he is chargeable to him that can first obtaine a Judgement. But the heires oz kinsmen, by reason only that they be heires oz of kin, cannot meddle with the goods of an Intestate, except where the heires shall haue their Lowmes, oz the childzen (after debts and legacies paid) a reasonable part of the goods after the custome of the Countrey.

Cap. XLI.

By the Ciuill Law, he that foz money will be hired to kill any man, there called Asciſmus, may after iudgement be slaine by any man. In our Law, there is no terme of Asciſmus; Neither if one intend foz money receiued to kill a man is it Felony, till hee haue done the act: Foz intent in Felony is not punishable by the Common Law: Contrarie in Treason. And if he doe kill the man foz money, he shall be only arraigned of Murder, & if he confesse it, oz plead not guiltie,

v. 4 co. 16. b.

and is found guiltie by xij. men, he shall haue iudgement of life and mem-
ber, and shall forfeit his lands and
goods: So shall he, if he stand mute
in an appeale brought of the Murder:
But for standing mute vpon an In-
dictment, he shall not be attainted of
the Murder, but shall haue Paine fort
& dure, viz. shall be pressed to death,
and there he forfeits only his goods,
and not his lands. But though a
man be outlawed, abiured, or other-
wise attainted of Felony, no man may
kill him but by authoritie of Law;
insomuch, that if a man haue Judge-
ment of Paine fort & dure, and the Offi-
cer beheadeth him, or on the contrarie,
it is Felonie: But if the Judgement
be, that he shall be hanged in chaines,
and the Sheriffe hang him in some o-
ther thing, he is not there guiltie of
his death, but it is finable, because he
hath not followed the words of the
Judgement. Any man (though no
Officer) may arrest him that is out-
lawed, or attainted of Felonie, and
bring him forth to be ordered accor-
ding to the Law, and if he kill him in
disobeying the arrest, he shall not be
impeached for his death. But by a
Capias in Debt or Trespasse directed

to

Fo. 10. b.
v. Co. li. 3. gentleman
ought not
to kill
attainted by the Law.
Stanf. pl. Cor. 150. b.
a
Fitz. 391. 11. Co. 30. b.
Pl. Cor. 262. b. *
Stanf. prer. 46. a.
Stanf. pl. Cor. 13. B. C.
c.
Stanf. pl. Cor. 13. A.

to the Sheriffe, no man may arreſt the partie, but by authoritie from the Sheriffe, and therefore if there he kill the partie in reſiſting, he is guiltie of his death.

Cap. XLII.

WHere the Maſter ſhall be charged for his Seruant, Deputie, or them vnder him in any office; and firſt where by Statute Law. By the Statute W. 2. cap. 11. if a Keeper ſuffer one to goe at large, that was committed vpon arrerages of accompt, an Action of Debt lieth againſt the Keeper, if he be ſufficient: But if not, againſt him that committed the keeping of the priſon vnto him. ¶ By the Statute of 1. E. 3. cap. 1. if Bayliffes of Franchiſes make a falſe returne, the partie ſhall haue auerment againſt it of two little iſſues, as of other things, aſwell as againſt the Sheriffe, but all the puniſhment ſhall be vpon the Bailiffe, and not on the Lord of the Franchiſe: But if an vnder-Sheriffe make a returne, whereupon the Sheriffe ſhall be

amerced, the high Sheriffe shall bee amerced, for the returne is expressely in his name; But if it be a false returne, whereupon an Action of Deceit lieth, that may be brought against the vnder-Sheriffe: See thereof the Statute De malè Retornantibus breuia. ¶ By the Statute 15. E. 3. the Kings Butler shall answer for his Deputies as for himselfe. ¶ Stat. Scacc. No Officer of the Exchequer shall put any vnder him, but such as he will answer for, which generall words are vnderstood aswell of an vntruth, as an ouerslight. ¶ Stat. 14. E. 3. cap. 9. appointed Gaoles againe to the Sheriffe, and that he shall make such vnder Gardeines, for which he will answer; for an escape the King may notwithstanding charge the Gaoler or Sheriffe by this Statute, if hee will: but for a wilfull escape, which is Felonie, the Gaoler shall answer himselfe and the Assentants, and not the Sheriffe, W. 1. cap. 15. ¶ He that hath a Sheriffwicke, Constableship, or Bailiwicke in fee, whereby he hath the keeping of prisoners, if he let to Replevin those not repleuisable, it is a forfeiture, if it be an vnder-Sheriffe, or Officer that doth it without assent

v. 4. Co. 34. a.

of

of the Lord, he shall haue imprisonment for three yeares, and shall be after ransomed at the Kings will: So here the Lord is not bound to answer the misdemeanor of his vnder-Officer, but himselfe. ¶ Stat. 27. E. 3. ca. 19. vocat Statute Staple; No Merchant or other shall lose their goods for the trespasse or forfeiture of their seruant, vnlesse by the Masters commandement, or that he offend in the office wherein his Master placed him, or that the Master be chargeable by the Law Merchant, as in some place is vsed. ¶ Stat. 14. E. 3. cap. 8. Wapentakes and Hundreds seuered from Counties shall be adioyned againe, and if the Sheriffe hold them in his hand, he shall place in them Bailiffes that haue land sufficient, and for whom he will answer, and that if hee let them to ferme, he let them to the the ancient ferme: And after Statute 23. H. 6. cap. 10. prohibiteth that he shall not let them to ferme, now they being in the Sheriffes owne hands, if he put in Bailiffes, they be but vnder-Bailiffes to the King, and the Sheriffe high Bailiffe, and they in manner the Sheriffes seruants; therefore by the said Statute of E. 3. the Sheriffe

shall

shall answer for them, if they offend in their office: But if the Sheriffe let them to ferme, though hee offend the Stat. of E. 3. thereby, yet quære whether the Sheriffe there be chargeable with their misdemeanor: For by some this Statute is to be understood only where the Bailywicks bein the Sheriffes hands, which is not so here, nor the Bailiffes his servants, but his fermors, and therefore if the Sheriffe shall be charged, it is by the Common Law, and not by the Statute. ¶ Stat. 2. H. 6. cap. 14. That Officers by Patent in every of the Kings Courts, that by vertue of their office have power to make Clerks in the said Courts, shall bee charged and sworne to make such for whom they will answer. ¶ West. 2. cap. 43. Hospitallers and Templers be prohibited, they hold no plea belonging to the Kings Courts, on paine of dammages to the partie greeued, and ransome to the King, the Superiors shall answer for their obediences, as for their owne deed. ¶ Stat. 14. H. 6. cap. 1. The Sergeant of the Catery shall satisfie all debts, dammages, and executions recouered against any Purueior, or Achator vnder him, and that offend

offend the Statute 36. E. 3. or this Statute (if they be not sufficient) and the Plaintiffe shall have a Scire facias against the said Sergeant to haue execution. ¶ Stat. Merchant, If a man be committed to prison vpon a Statute Merchant by the Maior, before whom, &c. and the Gaoler will not receiue him, he shall answer the debt, if he sufficient, he that committed the Gaole vnto him. ¶ Stat. West. 1. cap. 30. If outragious toll be taken in a Towne Merchant, if it be the Kings Towne let to ferme, the King shall haue the Franchise of the Market into his hands: If it be done by the Lord of the Towne, the King shall doe in like wise: If by the Bailiffe vnknowing the Lord, he shall yeeld againe that receiued, and suffer some dayes imprisonment: So here the Lord shall not answer for the Bailiffe. And in all cases supra, where the superior is charged for the inferior, the inferior is bound in conscience to restitution, except the obedienter superior, for that all that he hath, is the superiors, if he will take it. ¶ Cases where after the Common Law, the Master shall be charged for the act of his seruant. For trespasse of barrerie, entre

into

into lands, felonie or murder, not vnlesse by his Commandement. ¶ For money borrowed in his Masters name not, vnlesse it come to his vse, and that by his assent: [a] So of a Contract, vnlesse by the Masters commandement, or that it come to his vse by his assent. The Master sendeth the servant to a Faire or Market to buy things, without appointing of whom, the Master is chargeable: Contrarie, if the servant buy them in his owne name, vnlesse the things bought come to the Masters vse. ¶ The Master sendeth a thing defective to the Market to be sold generally, no action of Deceit lieth against the Master: Contrarie, if to be sold to such a man. ¶ If the servant keepe the Masters fire negligently, whereby the Masters house is burnt, and his neighbors also, the Master is chargeable: Contrarie, if the servant beare fire in the street negligently. ¶ If a stranger desire to lodge with one that is no common Hostler, and a servant there robbeth his chamber, the Master is not chargeable: Contrarie of a common Hostler. ¶ Two imprisoned, the one vpon an execution for money, the other for felonie, a servant of the Gar-

deine

[a] Pl. Com. 11. b. Xa. Br. 120. g. vt. post. 9. a. b. ca.

[b] v. Co. 8. 32. a

deine wilfully suffereth both escape, the Master is answerable for the debt, and finable to the King for the other, as a negligent escape, and the seruant alone answerable to the felonie, for the wilful escape. ¶ A man makes his generall receiuer, if he receiue money of a Debtor and makes him an acquittance, but payeth not the money ouer to the Master, the Debtor is discharged: But an acquittance without payment were no bar to the Master, vnlesse he gaue him authoritie by writing to make acquittances, and then the authoritie must be shewed: But if the seruant there accept an horse, it is no discharge, vnlesse it be deliuered ouer, and the Master agreeth to it, for the receiuer hath no power to make such commutation, vnlesse by speciall commandement. ¶ A seruant vnsent receiueth money due to his Master, as sent by him, no discharge, if it come not to the Masters vse by his assent. ¶ A Baily of a Manor payes a quite rent to a Grantee of the Seignior, it doth not counteruaile an Attornment, although the grant were by fine, neither bindeth the Master without his owne Attornment: But if the Lord be disseised of his Seigniorie,

Na. Br. 120. g.

Na. Br. 120. g. and the rap.

wayle, and the Bailly payeth the rent to the heire of the Lord, it is a good ſet-
- Pl. Com. 14. a. ting, though without commandement of his Maſter, for it belongeth to his office to pay rent ſeruices. Contrarie of rent charges. ¶ An increachment by payment of a Bailly, without commandement of the Maſter, binderh not the Maſter. ¶ Lord, Heine, and Tenant of a Manor, the Tenant attorneth, the Freelee tenderth notice, and payeth his rent to the Bailly of the
- 4. Co. 76. a. Heine, it chargeth not his auowrie, vnleſſe the Bailies receit were by his ſpeciall commandement. ¶ A ſeruant in his Maſters buſineſſe rides on his
- Ca. 47. Maſters horſe to a Towne, that may diſtrach goods vpon a plaine of debt, & in a plaine of debt againſt the ſeruant, the Maſters horſe is attached, the ſeruant appeareth not, the Officers ſeiſe the Maſters horſe, as forfeited, becauſe ſeiſed for the Maſter. ¶ An Hoſtler or Keeper of a Tauerne are not chargeable for their guests, vnleſſe for that done by their aſſent.

CAP.

Cap. XLIII.

The Ciuill Law admitteth no pro-
perty of goods in a Villeine, and
therefore determineth his gift of them
to be void. In our Law, a Villeine
hath as perfect a propertie in his goods,
and may as lawfully giue them as a
free man. But if the Lord seise them
before the gift, the Villeine his inte-
rest is determined. If the Lord seise
part in name of the whole goods, his
Villeine hath or hereafter shall haue,
it is good only for such as the Villeine
hath at the time, &c. If the Lord only
claime the goods, and seise no part, the
claime is void, and the gift of the Vil-
leine good notwithstanding. If the
Lord seise an Obligation, wherein
one is bound to his Villeine, it is the
Lords, but not to vse any action vpon,
but in the name of his Villein, therfore
if the Villeine release, the Lord is bar-
red. If a Villein marrieth a free man, by
the intermariage her goods be the hus-
bands, and it is too late for the Lord to
seise: And although the husband die,
and the goods come againe to the wife
as Executor to her husband, the Lord
cannot

antea ca. 18.

Extenuntur 100. Insti. fo. 118. b. Lit. Sect. 177.

Insti. fo. 117. a. l. 6. 10. 48 a.

Insti. 118. b.

cannot ſeiſe them, and yet ſhe is Neife as before the marriage. (B.) If the Neife purchaſe lands before the inter-marriage, and now the Lord enters, and after the husband hath iſſue by his wife, yet he ſhall not be Tenant by the Curteſie: Contrarie, if the iſſue were borne before entrie; for after iſſue the auowrie ſhall be made vpon the husband ſole, and if the wife die, the poſſeſſion is veſted in the husband by the Law, & not in the heire, and he is Tenant to the Præcipe. The Statute 19. H. 7. That the Lord ſhall enter into lands, whereof others are ſeiſed to the vſe of his Villeine, as it ſeemeth, ſhall alſo be vnderſtood of goods in vſe. If a Villeine be made Prieſt, the Lord may ſeiſe his lands and goods, as before, and the Villeine vntill ſeiſure may alien, as before: And now ỳ Lord may cauſe him to doe him ſuch ſeruice as is fit for a Prieſt before any other: but may put him to no labor, but that which is honeſt and lawfull for a Prieſt to doe. If a Villeine enter into Religion, in his yeare of probation he may alien, or the Lord ſeiſe his goods, as before he tooke the habit vpon him: but if after he make his Executors, and be profeſſed, otherwiſe

Lit. Sect. 173. 1. Co. 123. a.

Fitzh. 135. b. 9. Lit. Sect. 202.

Fitzh. 136. a. t.

it

it is. Neither may the Lord in that case seise his bodie, or put him to labour, but must suffer him to abide in his religion; And the remedie of the Lord is only by an Action against the Soueraigne for receiuing him without his licence, whereby he shall recouer such dammages, as a Iurie shall assesse: And Conscience agreeth with the Law herein. Lib. Sect. 202.

Cap. XLIV.

By the Ciuill Law, If a Clerke be promoted to the title of his patrimonie, and the same be expressely assigned to him, and by him accepted for a title, it shall goe as tied a thing of the Church, and may not be alienedd, except hee haue after another Benefice, whereof he may liue: Contrarie if it be secretly assigned, &c. In this Realme all inheritances must be ordered by the Kings Lawes: and if a Clerke accept his patrimonie for a title, yet it may be alienedd or charged, as before, for inheritances cannot bee bound by the Ordinarie, nor yet by the partie; but by Fine, or other mat-

ter of Record, Feoffment, &c. or at least by a bargaine which changeth an vse: And to assigne an estate for life to him that hath a Fee simple in the land is void, vnlesse it be by such matter that it worke by Conclusion or Estoppel, as here it doth not. And if the Clerke alien (as there is no interest for life, yeares, or otherwise, but may be alienen by the Law) if after he sue in the Spirituall Court to recouer it againe, a Prohibition or Præmunire lieth. And the Law of the Realme must in many cases be obserued in Conscience, aswell as in the iudiciall Courts.

Cap. XLV.

The xlv. Chapter consists of diuers questions taken out of the Ciuill and Canon Lawes.

Cap. XLVI.

Ignorantia Iuris excuseth in few cases, for euerie man at his perill is bound

bound to take notice of the Law, both Statute and Common Law. But ignorantia facti may excuse in many cases. If a Statute penall be made, and it is enacted that it shall be proclaimed before such a day in every Shire, and it is not proclaimed accordingly, yet he that offendeth it is punishable, unlesse there were further words, that the Proclamation be not made, that no man shall be bound: The reason, for that no Statute is made, but by the assent of the Lords Spirituall and Temporall, and all the Commons (viz. Knights of the Shire, Citizens and Burgesses, chosen by assent of the Commons, to represent the whole state of the Commons) then all being present by presumption of Law, no Proclamation needeth; so that the words of proclaiming are but of favor of the makers, whose intent cannot be taken, that the Statute should be void, if it were not proclaimed: But by some, if before the day limited for the Proclamation one offend, he shall not be punished, Quære, but admitting the Law so, it is not for that ignorance of the Law excuseth him, but the intent of the makers. The Statute 7. R. 2. cap. 6. is that every

Sheriffe shall proclaime the Statute of Winton three times euerie yeare in euerie Market Towne, to the intent the offenders may not be excused by ignorance. And admit the intent of the Statute (according to the opinion of some) to be that no forfeiture shall grow against them that were ignorant, but Proclamation were made, yet they are excused by the said particular Statute, and not by the generall rules of the Law. But in deed that Proclamation is neuer made, so that by such exposition the Statute of Wincheſter should be of little force: Therefore by some, the intent of the Statute of R. is only that the forfeiture may be taken in conſcience aſwell as in Law. In diuers Statutes, they that be ignorant be excuſed by the ſame Statutes. As by the Statute 13. R. 2. cap. viii. If any perſon take a Benefice by Proviſion, that he ſhall be baniſhed, and forfeit all his goods, and that if he be in the Realme, he auoid within ſix weekes after he hath accepted it, and that none ſhall receiue him after the ſix weekes, vpon like forfeiture; if he haue knowledge, &c. So he that receiueth him hauing no knowledge, is excuſed by the expreſſe

letter,

letter. So he that offendeth against Mag. Chart. is not excommenged, but he haue knowledge that it is prohibited that he doth; For they be only excommunicated by the sentence called, Sententia lata super chartas, that doe it willingly: Or doing it ignorantly, correct not themselues within fifteene dayes after warning. So a man may be excused vt supra, sometimes by the intent of the makers of a Statute: But there are few cases where a man shall be excused by ignorance of the Law only, except it might be applyed to Infants. An Infant of the age of discretion shall not be punished where the Stat. giues a corporall paine, but it is not his ignorance that excuseth him: For though he know the Statute, and wilfully offend it; As in pleading Joyntenancie by deed, which is found against him, or plead a Record, &c. in an Ass. and failes of it at the day, he shall not be punished, but the intent of the makers, which the Law presumeth was, that an Infant should not haue that corporal punishment. And yet it is thought that an Infant shall forfeit the penaltie of a Statute: As if hee had not beene excepted in the Statute of Fezindger, it

had bound him: So of Teller, leuying a troſe, Or if being a Gaoler, he ſuffer an eſcape, he ſhall pay the debt, for that the Statutes be generall: Like Law will that he may by a Statute penall loſe his goods. Alſo by an old Maxim for auoiding of murders and felonies, if an Infant of the age of diſcretion bee a murder or felonie, he ſhall be puniſhed as one of age: So of Treſpaſſe: which caſes run vpon the ground, where an Infant ſhall bee puniſhed, and where not, for the tenpernelle of his age though he be not ignorant, and not vpon the ground of Ignorance.

Fuſtit. 247. b. f.

Cap. XLVII.

Caſes where Ignorantia facti excuſeth, and where not. If a man buy an horſe in open market of one that hath no propertie, not knowing but that he hath right, the buyer hath good right to the horſe, and his ignorance excuſeth him, contrarie if hee had knowen hee had no right, or if he had bought him out of Market ouert. A retainer of another mans ſeruant,

ſeruant, not knowing of the former reteiner is excuſed by ignorance both againſt the Common Law, as alſo againſt the Statute of 33. E. 3. by the intent of the makers, that one ignorant of the former reteiner ſhould not incurre the penaltie: So of him that reteines another mans Ward, not knowing he is Ward. If the Tenant after homage due make a Feoffment, and the Lord not knowing thereof diſtraines for the homage, ignorance ſhall excuſe him of dammages in a Replevin, though he cannot auow for the homage. If a man be bound in Obligation to repaire the houſes of ỹ Obligee, as often as need ſhall require during ſuch a time, and after the houſes need reparation, though the Obligor know it not, in that hee hath bound himſelfe to it, he is to take notice at his perill, and ignorance excuſeth not: But if the condition had beene to repaire ſuch houſes, as the Obligee ſhould aſſigne, and after hee aſſigneth, &c. but the Obligor hath no notice of the aſſignment, that ignorance excuſeth, for ſith he that ſhould make ỹ aſſignment is partie to ỹ Deed, he is bound to giue notice of his owne aſſignment, contrarie if the aſſign-

8. Co. 93. a. ment had beene appointed to a stranger, there the Obligor must haue taken notice at his perill. If a man buy lands or goods, whereunto another hath title, ignorance excuseth him not. v. 5. Co. 84. a. Br. Fitz. 102. a. If a seruant come with his Masters horse to a Towne, where by custome they may attach goods for debt, and vpon a plaint against the seruant, the Masters horse is attached as the seruants, by information of the Plaintiffe, ignorance excuseth not the Officer, for where a man will enter into lands, seise goods, distraine, &c. hee must at his perill see it bee lawfully done. So if a Sheriffe vpon a Replevin deliuer other beasts than were distrained, though by information of the partie that distrained, Trespasse lieth, for hee shall bee compelled (as commonly all Officers be) to execute the Kings writ at his perill, according to the tenor thereof, and to see that the act which he doth be lawfully done: But if vpon a Summons in a Præcipe, the Sheriffe by information of the Demandant summon the Tenant in another mans land; for that he doth not in that case make any entrie or seisure of the land, but only summon the Tenant, and the writ doth

b. ca. 42.

doth not command him to ſummon the Tenant vpon his owne land, but generally to ſummon him, and then by an old Maxim it ſhall be in Terra petita, which he being ignorant of, the information ſufficeth him as to his entrie. (B.) But where he makes an entrie, and deliuers ſeiſin in execution, or ſeiſeth any thing, theſe muſt bee done at his peril, on paine to render dammages.

Cap. XLVIII.

The Law prohibiteth them that bee arraigned vpon an Indictment of felonie or murder to haue counſell: which is reaſonable, in that it is farther, that in all things that pertaine to the forme of pleading, the Iudges ſhall inſtruct the parties, that they incurre no dammage thereby. As if one would plead, that he neuer knew the partie ſlaine, or neuer had penny-worth of the goods ſuppoſed to bee ſtollen, they are bound in conſcience to informe him, that he muſt take the generall iſſue not culpable: for otherwiſe it were vnreaſonable to prohibit them

them counſell, and to driue them then to plead according to the ſtrict formalities of the Law, which they know not. But in an Appeale, though the Iuſtices of fauor will moſt commonly helpe forth the partie, and ſometimes his counſell, as they doe many times in Common Pleas in the forme of pleading, yet might they bid them plead at their perill, for no Law bindeth them to inſtruct him there, but that they may doe as they thinke beſt: But if the Appealee be poore, and haue no counſell, they muſt aſſigne him counſell, if he aſke it. And in the caſe of an Indictment ſupra, there is no difference though he be a common offender, or by preſumption guiltie, but the Iuſtices ought to giue him that the Law alloweth him, as if hee aſke Sanctuarie, or plead Miſnomer, or haue ſome Record to plead, as Auter foits arraine & acquite de meſme le felonie, which he cannot doe formally: But if the Iuſtices know that the partie is guiltie, as alſo that his plee is vntrue, they may bid him plead at his perill, contrarie if they doe but imagine it. The reaſon why counſell is admitted in an Appeale, and not vpon an Indictment, is for that commonly

Fryſt. 100. a.

monly it is to presume that the Appellor hath great malice against the Appellee, as when an Appeale is brought by the wife of the death of her husband, or by the son of the death of his father, or that an Appeale of robberie is brought for stealing goods. therefore if the Judges should instruct the Appellee, the Appellant would grutch and thinke them partiall, wherefore aswell for the indemnitie of the Court, as of the partie, if he be not guiltie, the Law suffereth him to haue counsell: But an Indictment, being at the Kings suit, the King intendeth nothing but Justice with fauor, and therefore he will be content the Justices helpe forth the partie, as farre as Reason and Justice may suffer, vpon which reason it began, that vpon an Indictment they should haue no counsell, as it seemeth, which is now growen into a Maxim.

Cap. XLIX.

A Man seised of lands in fee, hath issue two sonnes, the elder goeth beyond sea, and is commonly repor-

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ted to be dead, the father dieth, the younger entreth as heire, and alieneth with Warrantie, and dieth without issue, the elder returneth, this Collaterall Warranty bars him by a Maxim in Law, though he haue no Assets, &c. So also it seemeth in conscience, for it is as old a Law, that such a Warrantie shall barre the heire, as that the inheritance shall descend to the eldest sonne, and then Conscience followeth the Law in both cases alike: And this Maxim might haue a lawfull beginning; for it seemeth not against reason, that a man should be bound by the act of his Ancestor, to whom he is heire; for like as by the Law he shall haue aduantage by the same Ancestor, and shall haue his lands by descent, if he haue any right; so is it not vnreasonable, though the Law, for the priuitie of blood that is betweene them, suffer him to haue a disaduantage by the same Ancestor: But if ỳ Maxim were that it should be a barre, though he were not heire vnto that Ancestor, it were to be taken as against the Law of Reason, for it could haue no reasonable beginning. If the father binde him and his heires in an Obligation, and die, the sonne is not bound vnlesse

v. 2. Co. 25. b. Plond. Com. 439. b.

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he haue Affets by deſcent from his father: The cauſe for that the Maxim of the Law is none other, but that hee ſhall be charged if he haue Affets, &c. but if it had beene without Affets, it would haue ſtood with Conſcience. Like Law where a man is vouched as heire, he may enter as he that hath nothing by deſcent: But where hee claimeth the land in his owne right, the Warrantie of his Anceſtor ſhall rebut him, though he haue no Affets from him.

Cap. L.

Feoffee of a Diſſeiſor knowing of the Diſſeiſin, procureth a releaſe with Warrantie of an Anceſtor collaterall to the Diſſeiſee, which Anceſtor alſo knoweth of the right of the Diſſeiſee, and the Anceſtor dieth, and the Warrantie deſcends, this barreth in Law as in the precedent caſe; for if vpon euerie ſeiſure, releaſes or other writtings ſhould come in triall, whether they were made with conſcience or not, they ſhould be of ſmall effect; For auoiding of which inconuenience

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the Law will driue the partie only to answer whether it be his Deed or not, and not whether it were made with conscience or not, and though the partie may be at a mischeife thereby, yet the Law will rather suffer that mischiefe, than the said inconuenience. So if a woman, for feare of her husband, leuie a fine, yet the woman after her husbands death shall not be receiued to shew the matter, in auoiding of the fine, for the inconuenience that should follow thereby: And it is thought there is no remedie neither, in Chancerie in these cases; for that where the Common Law, in cases concerning Inheritances, putteth the party from any auerment, for eschewing an inconuenience, that if the same inconuenience should follow in the Chancerie, if the same matter should bee pleaded there, that no Subpena should lye, and as much delayes and costs will grow to the partie here, if he should be put to answer vnto them in Chancerie, as if at the Common Law. Yet it seemeth, that inasmuch as he knoweth the couenaunte was obtained by couin against conscience, he is in conscience, and by the Law of reason, to restore the land or recom-

pence

peuce the partie, though no Subpena lye, as in the case of a Fine with Nonclaime supra, cap. 14.

Cap. LI.

By the Common Law, goods wrecked vpon the Sea were immediately forfeited to the King, but now by the Statute of W. 1. cap. 4. If a man, dog, or cat, come aliue vnto the land out of the ship or barge, the Owner hath a yeare and day to come in and proue his propertie, which if hee doe, they shall not be iudged as wrecke, but he shall haue them; but if he come not in, they shall remaine to the King: And the Common Law, and consequently the Statute stands with equitie, for the Law must needs reduce the propertie of all goods to some man, and when the goods are wrecked, it seemeth the propertie of them is in no man, and if the propertie should remaine in the Owner, perraie hee would neuer claime them, and then it should not be knowen, who ought to take them, by which meanes they might perish, wherefore it is reasonable

v. Entroumbertito. C. 5. fo. 107. b. q. rest Stabulo rest foxg. declouration of roman leg. fo. Pl Com. 405. b. 5.

able that the Law appoint, who ought to haue them, which it hath done to the King, as Soueraigne ouer ỹ people. But if a man waiue his goods, and saith he forsaketh them, yet by the Law the propertie remaines in him, and he may seise them after, when hee will: If any man in the meane time put those goods in safegard, to the vse of the Owner, he doth lawfully, and shall be allowed his reasonable expences in that behalfe; As he shall bee of goods found: But shall haue no propertie in them, more than in goods found. If a man prescribe, that if he finde goods within his Manor, that he shall haue them as his owne, it is a void prescription, for it is against reason, and can haue no lawfull beginning, as it might in the case of wreche supra: Which is, The King by the old custome of the Realme, as Lord of the narrow seas (as it is said) is bound to scowre the Seas of Pyrats and petite Robbers, as King Edgar did twice in the yeare, which because it cannot be done without great charge, it is not vnreasonable that hee haue goods wrecked towards the same: But it is not meant, that the King ought to safe conduct the Merchants

vpon

vpon the Sea against outward enemies. So note a man may lose his goods, and no default in him: As where beasts stray, and be taken vp and proclaimed, and the Owner hath not heard of them within the yeare and day: So where a man killeth another with the sword of I. S. the sword is forfeited for a Deodand, &c.

5 Co. 110. b.

5 Co. 110. b.

Cap. LII.

A Iurie betweene partie and partie after they be sworne, and before they be agreed of their verdict, may not eat or drinke, but by licence of the Court; The beginning of which Statute was for the auoiding of diuers inconueniences, especially that they should not doe it at the costs of the parties, therefore if they eat, it may be alleaged in arrest of Iudgement: But with the assent of the Iustices, they may both eat and drinke, which maketh the Law reasonable.

Fitzh. lib. 227. E. 2.

Pl. Com. 520. a.

sonable. For if any of them fall sicke before they be agreed, so that hee cannot common of the verdict, hee may haue meat, drinke, and other necessaries by assent of the Justices, and his fellowes also, at their owne costs, or at the indifferent costs of the parties, if the parties so agree, but not at the costs of one partie alone. Also if the Jurie can in no wise agree, and that appeareth to the Justices vpon examination, they may suffer them both to haue meat and drinke for a time, to see if they can agree: If they will not then agree, the Justices may take such order as shall stand with reason and conscience, by setting a fine vpon the obstinate parties heads, or otherwise, as they thinke fit, and awarding a new Inquest: like as they may doe if one of the Jurie die before hee haue giuen his verdict, &c.

Cap. LIII.

Diuers giuen in all. treſpaſſe, &c. though commonly they bee vntrue, are giuen for this cauſe: There is a Maxim, that if the Defendant or Tenant in any action plead a plea that amounteth to the generall iſſue, that he ſhall be compelled to take the generall iſſue, and if he will not, he ſhall be condemned for lacke of anſwer. The generall iſſue in All. is Nul tort nul diſſeiſin. In a Writ of Entrie in nature of an aſſiſe, Ne diſſeiſa pas; In Treſpaſſe, Non culp. So euerie action hath his generall iſſue aſſigned by the Law, and the Tenant muſt of neceſſitie either take that generall iſſue, or plead in abatement of the Writ, to the Iuriſdiction, to the perſon, ſome bar, or ſome matter by way of concluſion. Therefore if I. S. intereſſe I. D. and a ſtranger bringeth an all. againſt I. D. whoſe title I. D. knoweth not; If hee ſhould bee compelled to plead to the

10. Co. 90. a.

Fitzh. 303. b. *

10 Co. 91. a.

point of the Assise, viz. Nul tort nul disseisin, the matter should be put in the mouths of tweine Lay men vnlearned in the Law: Wherefore it is better the Law be so ordered, that it be put in the determination of the Judges: And if the said I. D. should plead in barre that I. S. was seised, and him infeoffed, by force whereof he entred, iudgement si assise, that plee were not good; for inasmuch as it amounteth but to the generall issue, he shall be compelled to take the generall issue vt supra, therefore to the intent the matter may be shewed and pleaded before the Judges, rather then before the Jurie, the Tenants vse to giue the Plaintiffe a colour of action, whereby it shall appeare, that it were hurtfull to the Tenant to put the matter that he pleadeth to the iudgement of tweine men. The most common colour is, when he hath pleaded vt supra, that I. S. infeoffed him, he doth plead further and say, that the Plaintiffe claiming in by colour of a Deed or Feoffment made by the said I. S. before the Feoffment made to the Defendant, where nothing passed by the Deed entred

Co. lib. 10. 89. b.

tred, vpon whom the Defendant entred, Iudgement si assise; In this case, because it appeareth to be a doubt to Lay men, whether the land passe by the deed without liuerie or not, therefore the Law suffereth the Tenant to plead that speciall matter, to bring the matter to the determination of the Iudges: And the Iudges may not put the Tenant from the plee, for that as Iudges they know not, but that it is true; so there is no default in the Court, neither any in the Tenant, who doth it to a good intent, for though the Iurie vpon a generall issue may finde the truth, yet it is more danger, for feare of perturie, for them to inquire of many points than of one, and he loueth not his neighbor as himselfe, that offereth such danger vnto him, where he may well keepe it from him, if he will follow the order of the Law, vpon which reason colours may well stand with conscience also: And sometimes the Iudges will induce the the Tenant vnto it, to the intent aforesaid. Mendacium perniciosum, jocosum, & officiosum, their differences.

Cap. LIV.

The pleading in an Aſſ. to confeſſe no Ouſter, is in this manner; when the Tenant hath pleaded, that ſuch a man was ſeiſed, and infeoffed him, &c. and giuen a colour to the Plaintiffe, that he claiming in by colour of a Deed of Feoffment made by the ſaid Feoffor, where nothing paſſed by the Deed entred, then the Tenant vſeth to ſay further, vpon whom A. B. entred, vpon whom the Tenant entred, where in deed the ſaid A. B. neuer entred: And the cauſe of this manner of pleading is, for that if the Tenant by his pleading confeſſe an immediate entrie vpon the Plaintiffe, or putting out of the Plaintiffe called an Ouſter, then if after, the title be found for the Plaintiffe, the Tenant by his confeſſion were attainted of the Diſſeiſin, and it may be that though the Plaintiffe haue good title, that yet the Tenant is no Diſſeiſor. And there is no

default in the Court, nor in the Law, for they know not that it is untrue, and it lie or no default in conscience in the Tenant or his Counsell, in this manner of pleading, especially if his Counsell know that he is no Disseisor. If a man that hath secretly in the night stollen an horse, bee indicted thereof at the Kings suit, the forme is in the Indictment, to suppose that hee such a day and place with force and armes, that is to say, with staves, swords, and knives, &c. feloniously stole the horse against the Kings peace, which forme must bee kept, though the Felon had no weapon: And that there is no untruth in such an Indictment is thus proved; It is not alleaged in the Indictment by matter in deed, that he had such a weapon, for the forme is this; Inquiratur pro Domino Rege si A.B. tali die & anno apud talem locum vi & armis, viz. gladiis, &c. talem equum talis hominis felonicè cepit, &c. And then the Jurie is only charged with the effect of the bill, viz. whether he be guiltie or not of the felonie with in the Shire, and not whether hee bee guiltie modo &

forma, as in the bill is specified, and so when they say billa vera, they say truly, as they take the effect of the bill to be: So is it though the bill varie from the day, yeare, and place, so it varie not from the Shire: As if there were false Latine in the bill, they might well say billa vera, for their verdict stretcheth but to the Felonie, and not to the truth of the Latine. So if the partie supra bring an action of trespasse for his horse taken, as he may, though the horse were taken feloniously, for everie Felonie is a trespasse and more, and declare that the Defendant tooke the horse with force and armes, there is no untruth in the Plaintiffe, for that everie trespasse is in the Law done with force and armes. so that if he be attainted of the trespasse, he is consequently attainted of the force and armes, so the Plaintiffe saith truly, as the Law meaneth to be force.

Cap.

Cap. LV.

The Statute of 45. E. 3. That a Prohibition shall lie where a man is impleaded in Court Christian for Dismes of wood of the age of twentie yeares or above, by the name of Sylua cedua, is but a confirmation of the Common Law, which prescription and Statute are good, for they are neither against the Law of God, nor of Reason: And like Law is of the lop and barke of trees of such growth, as of the trees. And it seemeth, that before the Statute, Dismes should be paid by the Common Law of no trees, though the Statute now permit them to bee paid of trees within the age of twenty yeares, in such places where by prescription Dismes haue beene paid thereof; for the cutting downe is not the increase, but the destruction of trees: Contrarie of corne and grasse, for if they be not yearely cut downe, they come to nothing, so the cutting of them

n. 5. 48. b. Pl. Com. 470 a. t. 4. Ma. Br. 54. B.

them is the increase and preseruation thereof: So of the killing of beasts, &c. Also tithe of wood doth not serue as a certaine and yearely sustentation of the Curate, for which tithes were ordained, for that it is no yearely, but an vncertaine profit: And if a man cut not downe his corne, hay, &c. he is in conscience bound to recompence the Parson: Otherwise it is, if hee cut not downe his woods. Also a prescription within a certain limit to pay tithes of no manner trees though vnder xx. yeares growth, nor of corne or hay, so the Curate be otherwise prouided for, is good: For although Offmes (taken as a competent prouision for the Curate) be by the Law of Reason, the tenth part is by a Law of the Church, which may be altered: (Note a prescription is good, De modo decimandi, sed non de non decimando.) But one man cannot prescribe to bee quit of tithes for his land in D. when all the rest of the inhabitants in D. pay tithes: for the Curates care being no lesse for him than for the rest of the Parish, there is no reason therein, vnlesse hee sufficiently recompense the tenth part otherwise.

Vide C. 2. f. 44 b

wise. (B. Note a Custome cannot be particular, but in a whole Countrey or Towne.) But in these cases supra, if the partie be impleaded in Court Christian for his verie tithes, a Prohibition lieth not; for where it doth appeare by the Libell, that the Ecclesiasticall Court ought to hold plea, a Prohibition lieth not: Contrarie it is, where it appeareth in the Libell, that they ought not to hold plea, as of timber trees, &c. But if a Parishoner hauing made a composition with Parson, Patron, and Ordinarie, to pay certaine quarters of wheat to the Parson & his successors, for the tithe of such a ground, if after the tithes be demanded in the Spirituall Court as they fall, Quære whether a Prohibition lie, but clerely in the case of Prescription it lieth not. All tithes are either Prediall, by some called Prediall immediate, because they come meerely of the increase of the ground, Personall, as that is which commeth all of the industrie and labor of the person, as an Annuitie pro consilio, the gaines upon buying and selling, &c. Or the mixt tithes, as Calues, Lambs, &c.

by

2. Cro. Pt. a. 2. f. 44. a

c. Post Quære re solue Na. Br. 41. g. 43. k.

11. Co. 25. b.

by some termed Prædiall mediate, because they come partly of the earth, and partly of the industrie of the person. In prædiall and mixt Tithes the charges are neuer deducted: But otherwise it is of personall Tithes. Tithes are paid sometimes twice of one thing, as of Lambs, and of the wooll of the same sheepe; but then it is for another increase. If a man buy corne vpon the ground, the buyer shall pay the tithe, and not the seller. By some, of tin, coale, nor lead, no tithe shall be paid, for that they are part of the Freehold, as trees also are annexed to the Freehold, and not of the increase of the Freehold: Also they are vncertaine profits, &c.

Na. Br. 53. g.

FINIS.

Add with Hobart.